SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

No. 1183.

HENRY W. BENJAMIN, APPELLANT,

vs.

THE CITY OF NEW ORLEANS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JUNE 17, 1880.

(16,319.)

(16,319.)

SUPREME COURT OF THE UNITED STATES.

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HENRY W. BENJAMIN, APPELLANT,

vs.

THE CITY OF NEW ORLEANS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from circuit court of the United States for the eastern district of Louisiana	1	1
Bill of complaint	1	1
Exhibit A—List of transferrers of warrants sued on	9	7
Amendment of bill	10	9
Order on amendment of bill	11	9
Demurrer	11	9
Endorsement on demurrer: Demurrer set down for argument	13	11
Decree dismissing bill	14	11
Motion and order for appeal	14	12
Assignment of errors filed with motion for appeal	15	12
Bond for appeal	15	13
Clerk's certificate	16	13
Opinion	17	14
Hearing and submission	25	19
Decree	26	19
Assignment of errors	27	20
Motion and order allowing an appeal	29	21
Appeal bond	30	21
Opinion of the court	32	22
Certificate of clerk	35	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1897.

a UNITED STATES OF AMERICA,
Fifth Judicial District.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held, pursuant to law, on the third Monday of November, A. D. 1895, in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit; the Honorable Alex. Boarman, United States district judge for the western district of Louisiana, and the Honorable Emory Speer, United States district judge for the southern district of Georgia.

HENRY W. BENJAMIN, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee.

Be it remembered that heretofore, to wit, on the 22nd day of February, 1896, a transcript of the record of this cause from the circuit court of the United States for the eastern district of Louisiana was filed in the office of the clerk of said United States circuit court of appeals for the fifth judicial circuit in the words and figures following, to wit:

1 HENRY W. BENJAMIN
vs.
CITY OF NEW ORLEANS *et al.* No. 11983. In Equity.

Bill of Complaint.

Filed Feb'y 9th, 1891.

To the judges of the circuit court of the United States for the eastern district of Louisiana:

Henry W. Benjamin of New Orleans, an alien and a subject of the Kingdom of Great Britain, brings this his bill against the City of New Orleans, a municipal corporation, created by the laws of the State of Louisiana and a citizen of said State; the City of Kenner, also a municipal corporation created by the laws of and a citizen of said State; the Police Jury of the Parish of Jefferson and the Police Jury of the Parish of St. Bernard, political corporations created by the laws of and citizens of said State. And thereupon your orator complains and says:

1st. That by an act of the legislature of Louisiana (No. 74) approved September 14, 1868, the parishes of Orleans, Jefferson and St. Bernard, were territoril-y united in one district for the purpose of police government therein, called the "Metropolitan police district of New Orleans, State of Louisiana;" that the government of said district for police purposes was vested in a board of commissioners, styled the "board of Metropolitan police."

2nd. That said board was required to appoint all the officers and

employees of the police force, required in said district, and their salaries, which were prescribed by the act, were required to be paid monthly; that by said act, and acts of said legislature, supplementary to and amendatory thereof, said board was required to make, annually, an estimate of the expenses of maintaining a police force in said district, and to apportion the same to the several cities and parishes, within said district, and said cities and parishes, were required by said acts to promptly pay, *and to provide the means for promptly paying*, the amounts thus apportioned to them.

3rd. That said city of New Orleans was a municipal corporation created by the laws of said State of Louisiana, and was within
2 said Metropolitan police district; that said board from and after its creation, as aforesaid, annually made the estimate of expenses of maintaining said metropolitan police, and apportioned the same to said several cities and parishes as required by said acts.

4th. That the apportionments made by said board, as aforesaid, to the city of New Orleans were as follows, viz:

For the year 1869	$877,595 00
For the year 1870	838,274 07
For the year 1871	809,932 19
For the year 1872	724,460 90
For the year 1873	718,017 00
For the year 1873 additional	203,600 65
For the year 1874	713,208 40
For the year 1874 additional	182,886 53
For the year 1875	587,723 00
For the year 1876	500,000 00
Total	$6,155,697 74

and when said apportionments were made and notified, as they were, to said city, she became liable to said board of Metropolitan police for the amount thereof.

5th. That like apportionments of police expenses were made by said board, to the cities of Jefferson and Carrollton, which were within said police district, for which apportionments they each became liable to said board; but afterwards, by acts of said legislature, said cities were consolidated with the city of New Orleans, which, by said acts of consolidation, was made liable for their debts, including those created for their apportionment of police expenses aforesaid.

Your orator has not sufficient information to state the amount of the liabilities thus created and imposed upon said city of New Orleans, but avers, upon information and belief, that it was sufficient to pay and discharge the proportion of police expenses due by each of said cities.

6th. That like apportionments were made by said board of police expenses to be paid by said parishes of Jefferson and St. Bernard, and the city of Kenner, all within said police district, and notice

given to each of said corporations thereof as required by law,
3 and thereupon they became and were absolutely liable to said board for the amounts of their respective apportionments, but what the amounts of said apportionments were complainant is unable to state, but avers that they were sufficient to meet the annual police expenses within their respective jurisdictions.

7th. That while said cities and parishes, within the police district, were required to "promptly pay and to provide the means for promptly paying" their respective apportionments, the councils of said cities and the police juries of said parishes were authorized to raise the amounts required for that purpose by levying taxes upon the persons and things subject to taxation, within their respective jurisdictions, and for that purpose did severally make such levies, but whether for sufficient amounts to meet their respective liabilities complainant is unable to state; but he avers that said city of New Orleans, annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority, levied taxes for the purpose of paying the same; and collected and paid upon account of her apportionments large sums of money, but not enough to discharge her liability in the premises; there still being due upon account thereof the sum of nine hundred and forty thousand three hundred and seventy-nine and $\frac{66}{100}$ dollars, and the defendant, the present City of New Orleans, successor of said city, as existing at the time said apportionments were made, is liable therefor.

8th. That by the provisions of an act of said legislature approved February 7, 1869, and subsequent acts, all warrants issued in payment of salaries of officers, employees, and members of the Metropolitan police, and for the expenses of said board were made receivable for all parish and municipal taxes and licenses, within the limits of the Metropolitan police district, and for all debts due or to become due to the parishes and cities within said district, not exceeding in any one year the amount of their respective apportionments for that year.

9th. That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metro-
4 politan police force in said district, and appointed and employed the officers and members thereof, who entered upon their duties and rendered services, under contracts therewith, to be paid the salaries fixed by law for such employment, such contracts being made upon the faith of its revenues applicable to their payment being unimpaired.

10th. That by an act of said legislature, (No. 35) approved March 31, 1877, said act No. 74, of September 14, 1868, establishing said Metropolitan police district, said act No. 44 of February 27, 1869, making all warrants issued in payment of Metropolitan police salaries, and expenses, receivable for all municipal and parish taxes within the district; said act No. 94 of March 30, 1870, requiring the several cities and parishes within the district, to pay and provide

the means for the payment of their apportionments of the expenses of the board of Metropolitan police; said act No. 16 of March 24, 1875, entitled "An act, to enforce the payment by the city of New Orleans and the several cities and parishes of the Metropolitan police district of the apportionment made upon them by the board of Metropolitan police, and for other purposes," as well as all other acts amendatory of said above-enumerated acts, or upon the same subject-matter, were repealed; and said board of Metropolitan police was abolished, and no provision was made for the liquidation of its affairs or the payment of its debts.

11th. That said repealing act was in violation of section 10, article 1 of the Constitution of the United States, in that it impaired the obligation of the contracts made by said board of Metropolitan police, with its officers and employees, and others, to whom it was indebted, and who had contracted with and rendered services to said board, upon the faith of said provisions of law for the enforced payment and collection of the sums due to it as aforesaid, from the several cities and parishes within said district, out of which funds only, they could be paid and to that extent said act was and is null and void.

12th. That said city of New Orleans has from day to day and from year to year, ever since the passage of the repealing act of March 31, 1877, aforesaid, continued to collect the taxes levied as aforesaid, for the purpose of paying the apportionments of said city for police expenses, so as aforesaid made, and notified thereto; and is now making such collections, and enforcing the payment of taxes levied for that purpose, and now has a large sum of money thus realized, which is applicable to the payment of said city's indebtedness to said board of police and ought to be distributed among the creditors of said board, in reduction of their claims, including those of your orator.

13th. That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said laws, ceased to be, and has no representative or successor, against whom suit might have been or may be brought for the establishment of the demands of the complainant herein, and he is remediless, except in the honorable court where matters of this nature are cognizable and relievable; wherefore he brings this, his bill, in behalf of himself and all other creditors of said board, similarly situated, who may come in and contribute to the expenses of this suit.

14th. That said board being abolished, and without any successor or representative as aforesaid, and said city of New Orleans having collected a large sum of money, to wit, the sum of $— raised by taxation for and applicable to the payment of its apportionments of police expenses for the year- 1874, 1875 and 1876, Abraham Brittin, a creditor of said board of Metropolitan police applied to the civil district court for the parish of Orleans, Louisiana for the appointment of a receiver of said board for said funds and said city consenting thereto, by the order and decree of said court, Richard F. Harrison was appointed such receiver; that in such capacity he brought suit against the city of New Orleans, for the recovery of such taxes as had been collected

by the city, for said years, for account of said Metropolitan police board, and by the judgment of the supreme court of Louisiana (40 Louisiana Annual Reports, p. 512) recovered from said city upon that account, the sum of $30,944.94 and afterwards, to wit: the — day of July, 1888 said city paid to said receiver the amount of said judgment, the proceeds whereof said receiver on the 25th day of July, 1888, paid to and distributed among the holders of
6 claims against said board, and afterwards said city voluntarily paid to said receiver without suit sundry other small sums derived from the collection of such taxes for the purpose of having the same applied to the payment of the liabilities of said board, but the amount of such payments is unknown to complainant, but upon information and belief, he avers, that it does not exceed one thousand dollars. And complainant further shows that afterwards, to wit: on the 27th day of December, 1890, said Harrison died, and afterwards Joseph P. Hornor was appointed receiver in his stead, but his appointment was rescinded before he acted and said board of Metropolitan police is now without any successor, or legal representative, and its affairs are no longer under any administration whatsoever.

15th. That one Lew Goldstein as holder of a large amount of Metropolitan police warrants, issued to officers and members of the Metropolitan police, and as assignee of sundry creditors of said board of Metropolitan police, on the 21st of October, 1886, brought suit in the 26th judicial district court in and for the parish of Jefferson, Louisiana, against all the corporations made defendants herein, in behalf of himself and all other creditors of said board, similarly situated, praying the appointment of a receiver, and the enforcement of the liabilities of said several defendants for the purpose of paying and discharging the obligations of said board and citations were served the 26th of October upon each of said defendants, to appear and answer in said suit, and afterward said suit was removed into this hon. court, where holders of warrants and claims against said board amounting to $— appeared before the master, under the orders of the court, and proved their demands, as will appear by said master's report now on file, which is here referred to for greater certainty; that the case as against the city of New Orleans, was afterwards dismissed upon the ground that this court had not acquired jurisdiction thereof, but as to all the other defendants the same still remains pending and undisposed of.

16th. That your orator is the holder and owner, of Metropolitan police warrants, certificates, and claims against said board of
7 Metropolitan police, said warrants and certificates having been issued by said board for services rendered, and supplies furnished, and said claims being for services rendered and supplies furnished thereto, under contract therewith, a list of said warrants, certificates and claims amounting to $5,032.90, being annexed hereto as Exhibit A and made part of this bill; that all of said warrants, certificates and claims, were included among those held and sued upon by said Lew Goldstein, in his above-named suit, your orator

having since acquired the same which still remain due and unpaid.

17th. And your orator further shows and avers that there are now outstanding due and unpaid warrants and certificates issued by said board of Metropolitan police, and sums due and owing by it for services rendered and supplies furnished thereto, a large amount, the exact sum thereof being unknown to your orator; but he avers upon information and belief, that, including interest thereon, the amount exceeds two hundred thousand dollars; that said several cities and parishes within the police district being required by law to receive in payment of all taxes and licenses and debts due to them the warrants issued by said board as aforesaid, and by the act of the legislature No. 33, approved February 26th, 1874, all restrictions upon the amount to be so received were removed; and it is claimed by the city of New Orleans that in consequence thereof she received more of such warrants in payment of her taxes than her just proportion. And your orator avers, that the only assets of said board of Metropolitan police, at the time it was abolished, were the amounts due to it by said City of New Orleans and by the other defendants, as herein stated; that the aggregate amount of said indebtedness to said board largely exceeds the total amount of its debts and liabilities; that law and equity require that the amount of said assets should be ascertained, and the just proportion due by each of the defendants adjusted, and that the liabilities of said board of police be fixed and determined, and paid out of said assets; and if the same exceed the liabilities of the board, that said defendants be required to pay their *pro rata* shares thereof.

In consideration whereof and inasmuch as your orator has
8 not a complete and adequate remedy at law: To the end therefore, that the said defendants may, if they can, show why your orator should not have the relief thereby prayed, and that they and each of them may full, true and perfect answer make, to all and singular the premises (but not under any oath, the same being waived), that an account may be taken under the direction of this honorable court, before one of the masters thereof or otherwise as the court may direct, of all the debts, liabilities, and unpaid dues of every kind, of said board of Metropolitan police including the warrants, certificates and claims of your orator, and of all others who may come in and avail themselves of the decree to be made herein, and contribute to the expense of this suit; that a like account may be taken of the amount due by each of said defendants to said board of Metropolitan police for the balances of their unpaid apportionments of police expenses, as well as of all police taxes collected by them, and withheld from said board; and that said defendants be decreed to pay into the hands of some discreet person, to be appointed receiver by this honorable court, their several *pro rata* shares of the amount so found to be due to creditors of said board of Metropolitan police, including all costs of the administration thereof, and that the funds thus realized, be applied to the payment of your orator's said warrants, certificates and claims and of such other persons as may be creditors of said board and who shall come

in and establish their claims, and also to the payment of interest thereon, and all expenses of administration and costs.

May it please your honors to grant unto your orator, writs of subpœna directed to said city of New Orleans, to said city of Kenner, to said police jury of the parish of Jefferson and to the said police jury of the parish of St. Bernard, all municipal corporations of the State of Louisiana, therein and thereby commanding them and each of them, on a day to be named and under a certain penalty therein specified, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to abide and perform such order and decree as to your honors shall seem meet.

And your orator prays such other and further, and general
9 relief as the nature of the circumstances of the case may require, and as to equity and good conscience may be agreeable.

And your orator will ever pray, etc.

(Signed) ROUSE & GRANT,
Solicitors for Complainant.

(Signed) CHARLES LOUQUE, *Of Counsel.*

EXHIBIT "A," Annexed to Bill of Complaint, Being List of Transferrers of Warrants Sued on.

Filed Feb'y 9th, 1891.

METROPOLITAN POLICE, DECEMBER, 1874. CITY.

No. 1965—M. Dore, operator 7th sub. prt.,	Dec'r, '74...		118 90
" 888—F. Peters, " 3d prct.	Nov'r.....		115 06
" 272—J. Johnson, corp'l 5th "	Dec'r		93 42
" 277—J. Ward, No. 338, harbor	"		79 45
" 316—J. P. Martin, No. 149, 3d prct.	"		73 97
" 271—E. C. Vankork, corp'l, harbor	"		93 42
" 374—G. H. Hennershy, " 1st	"		90 41
" 389—John Spaulding, No. 76, 1st	"		84 93
" 402—L. G. Excelson, No. 44	"		76 71
" 420—P. H. Lewis, No. 82	"		84 93
" 423—J. B. Smith, No. 26	"		73 97
" 456—Joe Gray, capt'n 6th	"		152 87
" 474—J. L. Smith, det. supt. office	"		118 90
" 503—O. Rey, captain	"		152 87
" 508—Wm. Walsh, No. 343, harbor prect.	"		84 93
" 514—J. Dinace, No. 12, 1st "	"		84 93
" 517—S. Hale, No. 14, "	" "		52 05
" 537—A. J. Ward, No. 281, 6th "	"		84 93
" 538—J. Sullivan, No. 63, 1st "	"		84 93
" 588—F. Taylor, No. 102, 2nd "	"		79 45
" 596—J. Fiene, No. 372, sub'n	"		73 97
" 610—L. A. Thibaut, serg't 4th	.....		127 39
" 631—A. Rich, No. 176, "	"		73 97

No.	677—O. Rieffel, No. 239, 5th	Dec'r.....	76 71
"	680—J. R. Commons, No. 201, 5th	"	65 75
"	692—P. Gibney, No. 204, "	"	84 93
"	710—D. Demoullier, No. 219, "	"	84 93
	Carried forward.....		$2,468 68
10	Brought forward.....		$2,468 68
	No. 720—P. Clariss, No. 276, 6 prct.	Dec'r..	79 45
No.	838—A. Clavin, No. 347, harbor	" ..	84 93
"	861—Z. Jones, No. 115, 2nd	" ..	73 97
"	866—D. Kevlin, No. 103, 2nd	" ..	84 93
"	870—Geo. Haenchen, No. 143, 3rd	" ..	82 19
"	878—M. Hersro, No. 118, "	" ..	57 53
"	939—D. C. Hennessy, doorman supt. office	" ..	50 95
"	952—C. Labuzan, corp'l, 2nd prect.	" ..	93 42
"	960—John Palmers, No. 105, 2nd prect.	" ..	63 01
"	963—John Ford, No. 106, "	" ..	73 97
"	1089—H. Ginding, No. 166, "	" ..	32 87
"	1104—V. D. Egana, No. 155, 3d prect.	" ..	60 27
"	1166—L. Kiernan, No. 114, 2nd "	" ..	79 45
"	1177—J. Ferrand, No. 238, 5th "	" ..	54 79
"	1204—Thos. Fitzgerald, No. 18, 1st "	" ..	47 01
"	1209—W. Crothy, No. 30 "	" ..	82 19
"	1224—J. Gonzales, No. 161, 4th "	" ..	84 93
"	1422—Jas. Duffy, No. 94, 2nd "	" ..	84 93
"	1525—H. O. Shayer, No. 355, sub. prect.	" ..	84 93
"	1561—P. J. Isabell, No. 259, 6th prect.	" ..	84 93
"	1674—G. P. Schreiber, captain	" ..	152 87
"	1701—J. P. Montamat, " 3rd	" ..	102 87
"	1712—Thos. Flanagan, " 1st	" ..	152 87
"	1751—Eli Jones, No. 83. "	" ..	30 13
"	1758—M. Nolan, No. 121, 3d	" ..	60 27
"	1970—J. B. Ballard, No. 255, 6th	" ..	84 93
"	2073—J. H. Thompson, No. 100, 2nd	" ..	69 03
			$4,562 30
	Brought forward.....		4,562 30
No.	613—D. Ralti, operator, 4th December.....		95 89
No.	889—F. Peters, operator, 3d December.....		118 90
No.	180—W. Hereford, No. 265, 6th December.....		16 71
No.	64—M. Cazzens, No. 123, 3d December..... ..		84 93
No.	44—E. W. Sewell, operator, 3d December.....		118 90
No.	59—J. Lynch, No. 88, 1st December		35 27
			$5,032 90

Amendment of Bill.

Filed April 27, 1895.

United States Circuit Court, Eastern District of Louisiana.

HENRY W. BENJAMIN
vs.
THE CITY OF NEW ORLEANS *et al.* } No. 11983.

11 By leave of court first had and obtained, the complainant comes now and amends his bill herein by inserting at the end of the sixteenth paragraph, and before the seventeenth paragraph thereof, on page 14 of said bill, the following averment, viz: "And your orator avers that *each* of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th day of February, 1891, citizens respectively of States other than the State of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made."

Wherefore, complainant prays as he hath already prayed, and that said defendants be required to answer this amendment, on or before the next rule day, and for general relief.

(Signed) ROUSE & GRANT,
Solicitors for Comp't.

Order.

Let this amendment be filed; a copy thereof served upon the defendant, and let the city of New Orleans plead or answer the same on or before the next rule day after such service.

New Orleans, April 27, 1895.

(Signed) DON A. PARDEE, *Judge.*

Demurrer.

Filed May 6, 1895.

United States Circuit Court.

H. W. BENJAMIN
vs.
THE CITY OF NEW ORLEANS. } No. 11983.

Demurrer of the City of New Orleans to the bill of complaint of H. W. Benjamin, complainant.

12 This defendant by protestation not confessing or acknowledging all or any of the matters in and by the said bill set forth and complained of to be true in manner and form, as

the same are therein and thereby set forth and alleged, says that it is advised that there is no matter or thing in the complainant's said bill of complaint contained, good and sufficient in law to call this defendant to account in this honorable court for the same; but that there is good cause of demurrer thereunto, and it does demur thereunto accordingly, and for causes of demurrer says:

That the complainant's said bill of complaint in case the same were true, which this defendant does in nowise admit, contains not any matter of equity, whereon this court can ground any decree, or give the complainant any relief or assistance as against it, this defendant.

And for further cause of demurrer, this defendant specially says:

That the court has no jurisdiction because on the questions certified by the circuit court of appeals to the Supreme Court of the United States, that court determined that the bill stated no case of equity arising under the Constitution and laws of the United States, cognizable in this court, and no case of diverse citizenship, and that no such last case could be stated, and under such determination by the Supreme Court, this court has no jurisdiction, save to dismiss the bill.

That the jurisdiction of this court, of suits on the Metropolitan certificates or warrants, and claims against the Metropolitan police board sued on, is prohibited by the 2nd section of the act of Congress of ——, 1888, 24th Statutes at Large.

That it is manifest by the bill that if the complainant has any cause of complaint in respect to the Metropolitan warrants, certificates and claims against the Metropolitan police board he claims to have acquired; his remedy is perfect, adequate and complete at law against the city of New Orleans, and not in equity.

That if this court had any jurisdiction to allow or entertain said amendment or said bill, the said amendment is defective, and not sufficient to require this defendant to plead or answer thereto, it being essential that the amendment should state the names and residences and citizenship of the persons to whom the war-
13 rants and certificates issued, and to whom accrued the claims against the Metropolitan police board, who are averred by the amendment to be now and to have been citizens of States other than Louisiana, on the 25th of March, 1891, and whose aforesaid warrants, certificates and claims, the amendment alleges the complainant acquired; and said statement, besides being essential as a jurisdictional averment in the bill, is requisite also to apprise defendant of the testimony proposed to be offered, and enable the defendant to controvert by testimony the said allegations of citizenship in the vague and general terms of the amendment.

Wherefore, and for divers other errors and defects in the complainant's said bill of complaint contained, and appearing on the face thereof, this defendant does, as aforesaid, demur in law thereunto, and humbly craves the judgment of this honorable court, whether it is compellable, or ought to make any answer thereunto otherwise than as aforesaid, and this defendant humbly prays to be

hence dismissed with its costs and charges in this behalf most wrongfully sustained.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.

I hereby certify that in my opinion the above demurrer is well founded in law.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.

Personally appeared John Fitzpatrick, mayor of the city of New Orleans, who, being duly sworn, deposes and says that he is the mayor of the city of New Orleans, and that the above demurrer is not interposed for delay.

(Signed) JOHN FITZPATRICK.

Sworn to and subscribed before me this 6th day of May, A. D. 1895.

[SEAL.] (Signed) CAS. H. SHIELDS, *Not. Pub.*

Endorsed: And now comes Henry W. Benjamin, the complainant, by Rouse & Grant, his solicitors, and sets down the within demurrer for argument. N. O., May 23, '95. (Signed) Rouse & Grant, sol'rs.

14 *Decree Dismissing Bill.*

Entered and filed January 20, 1896.

United States Circuit Court, Eastern District of Louisiana.

HENRY W. BENJAMIN *et als.* *vs.* THE CITY OF NEW ORLEANS. } No. 11983. In Equity.

This cause came on to be heard at a former day upon the demurrer filed May 6, 1895, by The City of New Orleans, defendant, to the bill of complaint as amended, and after argument from the solicitors for the parties respectively was submitted and taken under advisement.

On consideration whereof, it is ordered, adjudged and decreed that the said demurrer be maintained and the bill of complaint dismissed with costs.

(Signed) CHARLES PARLANGE, *Judge.*

New Orleans, January 20th, 1896.

Motion and Order for Appeal.

Filed January 27, 1896.

United States Circuit Court for the Eastern District of Louisiana.

HENRY W. BENJAMIN
vs.
CITY OF NEW ORLEANS *et al.* } No. 11983.

On motion, in open court, of Rouse and Grant, solicitors for the complainant in the above cause, suggesting error to the prejudice of the complainant, in the final decree rendered, and signed in said cause January 20th, 1896, as set forth in the assignment of errors filed herewith and made a part of this motion; and that complainant desires to have said decree reviewed—

It is now ordered that an appeal herein be allowed to said complainant, returnable to the United States circuit court of appeals for the fifth circuit within thirty days, and according to law, upon his furnishing bond with solvent surety, in the sum of two hundred and fifty dollars, and conditioned as the law directs.

(Signed) CHARLES PARLANGE, *Judge.*

New Orleans, Jan'y 27, 1896.

Assignment of Errors.

Filed, with motion for appeal, January 27, 1896.

United States Circuit Court for the Eastern District of Louisiana.

HENRY W. BENJAMIN
vs.
CITY OF NEW ORLEANS *et al.* } No. 11983.

Complainant's assignment of errors.

1st. Said circuit court erred in sustaining the demurrer to the complainant's bill as amended, and in dismissing the same.

2nd. Said court erred in holding that complainant's bill as amended, does not state a case within the jurisdiction of a court of equity.

3rd. Said court erred in holding that complainant's bill as amended, does not state a case within the jurisdiction of said court.

4th. If said demurrer was well taken, said court erred in dismissing the bill absolutely, and should have dismissed it without prejudice.

Wherefore, for the errors assigned, and others manifest in the record, said complainant prays that said decree be reversed, and said cause reinstated to be proceeded with according to law.

(Signed) ROUSE & GRANT,
Solicitors for Compl't.

Bond for Appeal.

Filed January 27, 1896.

16 Know all men by these presents, that we, Henry W. Benjamin, as principal, and J. D. Rouse, as surety, are held and firmly bound unto the City of New Orleans in the full and just sum of two hundred and fifty dollars to be paid to the said City of New Orleans, La.. certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of January in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at a session of the United States circuit court for the eastern district of Louisiana, in a suit depending in said court, between Henry W. Benjamin and said City of New Orleans, No. 11983 of the docket of said court, a decree was rendered against the said Henry W. Benjamin, and the said Benjamin having obtained an order granting him an appeal, and the same having been entered of record, to reverse the decree in the aforesaid suit, said appeal having been granted upon motion in open court, at the same term at which said decree was rendered, the said appeal being made returnable to the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Henry W. Benjamin shall prosecute his appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) HENRY W. BENJAMIN, [SEAL.]
By ROUSE & GRANT, *His Sol'rs.* [SEAL.]
(Signed) J. D. ROUSE. [SEAL.]

Approved by—

(Signed) CHARLES PARLANGE, *U. S. Judge.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing 22 pages contain and form a full,
17 complete, true and perfect transcript of the record and proceedings had, on the trial of the demurrer to the bill of complaint as amended in the case of Henry W. Benjamin *vs.* The City of New Orleans *et als.*, No. 11983 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 20th day of February, A. D. 1896.

[SEAL.] E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify, that Edward R. Hunt, whose name is signed to the above certificate, as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 20th day of February, A. D. 1896.

CHARLES PARLANGE, *Judge.*

Opinion.

Filed January 20, 1896.

U. S. Circuit Court, Eastern District of Louisiana.

H. W. BENJAMIN *vs.* CITY OF NEW ORLEANS *et al.* } No. 11983.

Opinion on demurrer. Filed May 6, 1895.

PARLANGE, *J.:*

The mandate of the court of appeals to this court reverses the judgment of this court heretofore rendered herein and directs the dismissal of the bill unless, by proper amendment and in accordance with the views expressed by the supreme court in this case, the jurisdiction of this court be made to appear affirmatively. The complainant has amended his bill by averring that the 18 persons in whose favor the claims accrued and to whom the certificates were issued, are now and were on February 9th, 1891, (the date of the filing of the bill), citizens of States other than the State of Louisiana, and competent, as such citizens, to maintain suit in this court against the defendants for the recovery of the indebtedness represented by the certificates, if no assignment or transfer thereof had been made.

The States of which the original certificate-holders are averred to have been citizens at the time of the filing of the bill, are not named. Complainant's counsel referred in argument to a list of the certificate-holders filed with the bill as Exhibit A, but that list furnishes no information whatever as to the States of which the certificate-holders were citizens, and if any inference is to be drawn from the list, it is that the certificate-holders were citizens of Louisiana.

In this case four questions were submitted to the supreme court by the court of appeals, to wit (153 U. S. page 418):

First. "Does the case made by the bill alleging that the board of police has been abolished and left without successor or legal repre-

sentative and no provision has been made for the application of its assets to the payment of its debts and the answer herein, constitute a suit in equity arising under the Constitution of the United States and within the jurisdiction of the circuit court of the United States for the eastern district of Louisiana, without regard to the diverse citizenship of the parties?"

Second. "The warrants and the certificates held by the complainant having been issued for services rendered and supplies furnished under contract with the board of Metropolitan police, when the laws required said warrants and certificates to be received by the defendants in payment of all licenses taxes and other dues, and all such laws having been repealed by the legislature of Louisiana without making other provision for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of article 1, section 10 of the Constitution of the United States?"

Third. "Do the pleadings show a suit to recover the con-
19 tents of choses in action within the meaning of the judiciary act of 1887 and 1888, so as to preclude the complainant, as assignee, from suing in the circuit court of the United States, to establish a fund out of which he, in common with other creditors of the late Metropolitan police board may be paid *pro rata* upon their claims?"

Fourth. "Considering all the allegations in the bill of complaint and the provisions in the constitution and laws of Louisiana respecting the Metropolitan police board and the Metropolitan police warrants and certificates and the redemption and payment of said certificates, does the case show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond its liability for taxes assessed and collected in pursuance of the apportionments made?"

The first question was answered in the negative; the third, in the affirmative; and while the second question was not answered directly, the language of the Supreme Court, 153 U. S., pages 429, 431 and 432, makes it clear that, if the court had deemed it necessary to directly answer the second question, the court would have answered it in the negative.

The grounds of equitable cognizance relied upon in this case were, after the citation of authorities believed by complainant's counsel to be applicable, set out in the brief of complainant's counsel filed in the Supreme Court, as follows (pages 14 and 15 of the brief):

"The destruction of the board of police by the repealing act deprived its creditors of their action at law against it for the enforcement of their demands, and left them without remedy except in a court of equity; which, * * * will lay hold of its property and administer it for their benefit. Judgment at law and fruitless execution are not required, because impossible, in the absence of an existing debtor. * * * And it has been held by this court (the Supreme Court) that by the French jurisprudence which prevails in Louisiana, a creditor may exercise the right of action of his

debtor and that 'the right thus claimed for the creditor may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States, and all existing rights, in any State of the Union, ought to be suable in some form in those courts.' New Orleans *vs.* Gaines, 131 U. S., 191–213."

The Supreme Court distinctly states that the above are the grounds of equitable cognizance relied upon. I read from their opinion, U. S., page 428 *et seq.:*

"The jurisdiction in equity in this case is found in the inadequacy of the remedy at law, either because the rights claimed could not be enforced at law or because they could not be administered in that forum. The bill was manifestly framed to bring the case within the class in which receivers are appointed to collect the assets and pay the creditors of a dissolved corporation. Broughton *v.* Pensacola, 93 U. S., 266, 268; Meriwether *v.* Garrett, 102 U. S., 472, 527. Indeed, it was expressly averred that the State courts had proceeded upon that principle in respect of similar warrants and certificates, and reference was made in terms to a decision of the supreme court of Louisiana in that behalf. Harrison *v.* City of New Orleans, 40 La. Ann., 509. The contention was that the holders of these warrants had a right to bring an action at law against the board of police to recover thereon, and that the dissolution of the board left the complainants without remedy except in a court of equity, judgment and execution at law not being required because impossible by reason of the dissolution of the board. Therefore the court in chancery was appealed to to lay hold of the assets of the board as in the nature of a trust fund and apply them to the payment of the claims. Those assets, as shown by the bill, were the apportionments, the tax levies and the taxes collected. These were the means provided by law for the payment of debts created by the board, and if they were left unaffected by the repealing act the alleged impairment had no basis to rest on. That act was essentially a mere change of an instrumentality of municipal government. It abolished the police organization established in 1868, and vested in the city the function of maintaining its own police. This legislation was not in contravention of the Constitution of the United States, and was enacted in the exercise of the undisputed power of the State in that regard. In making the change no obligation rested on the State to create an independent and corporate successor of the board or to provide for the application of its assets to the payment of its debts if existing laws were ample to effect that purpose. In that view the city of New Orleans remained for all purposes, so far as creditors were concerned, the representative of the board, and if the city were under a liability to pay the apportionments in cash, it was not absolved from that liability by the dissolution of the board. Although the creditors could not avail themselves of the instrumentality of the board to sue for the apportionments (if that could ever have been done) still, as those apportionments had all been made and taxes had been levied and were in course of collection to pay them, or so much thereof as was

needed to pay the warrants and certificates, the act of 1877 left the city of New Orleans to respond as before to the creditors in reference thereto, and the remedies to which they could resort were quite as efficient as they ever had been."

"In New Orleans *vs.* Gaines, administrator, 131 U. S., 191, it was held that under the jurisprudence prevailing in Louisiana a creditor might exercise the right of action of his debtor, a right analagous to the garnishee or trustee process in some States, and that this right could be enforced in a Federal court by a suit in equity on the principle of subrogation. But if this bill could be maintained on the doctrine therein recognized, or if the equitable principle of apportionment as between parties charged with a common burden were applicable as justifying equity interposition, the result on the point under consideration would be the same. Jurisdiction could not be obtained upon the bare averment of an anticipation that the city might rely on the repealing act as wiping out apportionments, tax levies and tax collections and that the State courts would so decide. And the bill made no such specific averments with which, indeed, many of its allegations were wholly inconsistent; while the defence of the city not only rested on no such ground, but
22 the answer denied that the repealing act was susceptible of that construction or could be given that effect."

"This would be equally true if, as suggested by counsel for the city, the board could never have been treated as a debtor (unless it had collected taxes under act No. 16 of 1875, and retained them), inasmuch as it had nothing to do with raising the sums apportioned to the local authorities, upon whom alone the duty was devolved to accomplish that through the exercise of the power of taxation, and the holders of warrants and certificates could from the first only have resorted to the police fund created through the medium of the annual apportionments."

I also read from the opinion of the Supreme Court, 153 U. S., page 432:

"We have seen that the ground of equitable cognizance relied on is that the holders of these warrants and certificates had the right to bring an action at law against the board of police to recover thereon, and that the dissolution of the board left the complainants without remedy except in a court of equity, judgment and execution at law not being required because impossible by reason of the dissolution of the board. It is insisted that the city stands in the position of a debtor for taxes collected on police board apportionments and for the amount of the apportionments themselves, so far as outstanding. If this were so, and the police board were still in existence and liable to suit, then complainants would be obliged to recover judgment against the board and proceed against the city by way of creditor's bill to enforce the collection. Granting that this could be done without judgment after and because the board had ceased to exist, nevertheless the claims of complainants must be established under the bill precisely as they would have to be in an action at law. Although it is ingeniously said that the suit is one to 'establish a fund,' this does not change the fact that it is a suit to

recover on the warrants and certificates, and then enforce their payment by a decree over against the city. The establishment of a fund is, in this instance, only another name for the ascertain-
23 ment of an indebtedness of the city to the board, available to the creditors of the board, after their claims as such are judicially determined."

I read further from the opinion of the Supreme Court, 153 U. S. page 435:

"If the board had not been abolished, judgment could not have been recovered against it by complainants in the circuit court; and if a judgment had been recovered by them in the State court, a creditor's bill would have been merely ancillary to the judgment, and could not have been entertained in the circuit court as an original bill. Upon the facts appearing in this record, the assignees would have acquired no new and independent right of recovery, by reason of the judgment, not possessed by the assignors. The board being abolished, recovery of a judgment was dispensed with, but the establishment of the claims was still required as the basis for further relief, and that relief involved nothing more than recovery over, or a direct decree within the principles of New Orleans *vs.* Gaines' Admr., *supra*, analogous to judgment on garnishee process. The suit must, therefore, be regarded as a suit to enforce the payments of the warrants and certificates, and as such, a suit to recover their contents, and this is so on any other ground of equity jurisdiction, which has been suggested."

"In our judgment the pleadings show a suit to recover the contents of choses in action, and, as the bill contained no averment that it could have been maintained by the assignors, if no assignments had been made, (from the statement accompanying the certificate it appears affirmatively that it could not), the jurisdiction of the circuit court cannot be sustained on the ground of diverse citizenship."

Why did not the Supreme Court answer all the questions? Because the opinion indicates that the court believed it had finally disposed of the case by answering the first and third questions and by strongly intimating its opinion as to the second.

The Supreme Court had clearly said that the case was not
24 a suit in equity arising under the Constitution of the United States. It had clearly stated that the only grounds of equitable cognizance contended for were untenable. It had clearly characterized the case as being a suit for the recovery of the contents of choses in action, and as the court of appeals has certified to the Supreme Court that the assignors of the complainant were citizens of Louisiana (153 U. S. page 417), the Supreme Court, at the close of their opinion (153 U. S. page 435) said, as already stated:

"As the bill contained no averment that it could have been maintained by the assignors, if no assignments had been made (*from the statements accompanying the certificate it 'appears affirmatively that it could not'*)—(the underlining is mine), the jurisdiction of the circuit court cannot be sustained on the ground of diverse citizenship."

Virtually the only one of the four questions which the Supreme Court left unanswered is the fourth, which inquires whether the city of New Orleans is liable beyond the taxes assessed and collected. In my judgment it is clear that the reason of the Supreme Court for failing to answer that question was that by answering the other questions the court considered the case finally disposed of. In other words, having found that the only grounds of equitable cognizance contended for were untenable and that the suit was a suit to recover the contents of choses in action, and finding further, upon the statement of the Court of Appeals, that there was no diverse citizenship in the case, it was idle to deal with the fourth question.

To sustain the demurrer and dismiss the bill, I need go no further than to say that the complainant has not complied with the order of the court of appeals. He has not made the jurisdiction of this court appear affirmatively. In fact, according to the statement of the court of appeals to the Supreme Court, the complainant cannot make the jurisdiction appear. He should have named the States of which the certificate-holders were citizens. The diverse citizenship is the jurisdictional basis of this case. It is an issuable fact.

I am clear that the demurrer must be sustained and the bill dismissed.

25 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

WEDNESDAY, *April* 8, 1896.

(*Extract from Minutes.*)

HENRY W. BENJAMIN, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee.

This cause was regularly called this day and submitted to the court after argument by Mr. Jno. D. Rouse for the appellant and by Mr. Branch K. Miller for the appellee.

26 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

TUESDAY, *April* 28, 1896.

(*Extract from Minutes.*)

HENRY W. BENJAMIN, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of said circuit court in this

cause be, and the same is hereby, affirmed without prejudice to the right of the plaintiff to sufficiently present his cause, if any he has, in the court having jurisdiction.

It is further decreed that the appellant, Henry W. Benjamin, and the surety on the appeal bond herein, J. D. Rouse, be condemned *in solido* to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

27 And afterwards, to wit, on the 18th day of May, 1896, an assignment of error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals for the Fifth Circuit.

HENRY W. BENJAMIN
vs.
CITY OF NEW ORLEANS. } No. 466.

And now comes Henry W. Benjamin, complainant and appellant, and with his motion for appeal herein from the judgment and decree rendered on the 28th day of April, 1896, makes the following assignment of errors:

28 First. Said circuit court of appeals erred in holding that in order to give jurisdiction of complainant's bill to the circuit court it was necessary for the complainant to aver that the assignors of the certificates on which he sues as assignee *was* such at the time the assignment was made as would have enabled them to sue in the circuit court if no assignment had been made.

Second. Said court erred in holding that in order to show jurisdiction in the circuit court, in which complainant's suit was brought, it was necessary to set out and aver specially of what particular State each of the several assignors of complainant's certificates were citizens at the time the suit was brought.

Third. That said court erred in affirming the decree of the circuit court dismissing the bill for want of jurisdiction, when it ought to have reversed the decree in all respects and remanded the case with directions to proceed according to law.

Wherefore, for the errors assigned and others manifest in the record, said complainant prays that said decree of said circuit court of appeals, as well as the decree of said circuit court, be reversed and that the case be remanded to the circuit court of the United States for the fifth circuit and eastern district of Louisiana with directions to proceed according to law.

(Signed) J. D. ROUSE,
WM. GRANT,
Solicitors for Appellant.

Endorsed: Filed May 18, 1896. J. M. McKee, clerk.

29 United States Circuit Court of Appeals, Fifth Circuit,
November Term, 1895.

MONDAY, *May* 18, 1896.

(*Extract from Minutes.*)

HENRY W. BENJAMIN
v.
THE CITY OF NEW ORLEANS.

On motion of John D. Rouse and William Grant, solicitors for Henry W. Benjamin, complainant and appellant, suggesting that he is advised and believes that there is error to his prejudice in the decree of this honorable court made during the present term, to wit, on the 28th day of April, 1896, in the above-named case, and that he has a right to appeal to the Supreme Court of the United States for the correction of said error, of which he has made and filed assignment herewith—

It is ordered that he be granted an appeal from said judgment and decree to the Supreme Court of the United States, returnable within thirty days, on his giving bond in the sum of five hundred dollars for the payment of costs of said appeal and conditioned as the law directs.

30 And afterwards, to wit, on the 23d day of May, 1896, an appeal bond was filed in said cause in the words and figures following, to wit:

UNITED STATES OF AMERICA:

Know all men by these presents that we, Henry W. Benjamin, as principal, and —— ——, as surety, are held and firmly bound, jointly and severally, unto the City of New Orleans in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said City of New Orleans and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the 23rd day of May, in the year of our Lord eighteen hundred and ninety-six.

Whereas the said Henry W. Benjamin having heretofore, to wit, on the 18th day of May, 1896, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 28th day of April, 1896, by the United States circuit court of appeals for the fifth circuit, in the suit of Henry W. Benjamin *vs.* The City of New Orleans, No. 466 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden Henry W. Benjamin shall prosecute his said appeal to effect and shall answer all costs if he shall fail to make good his

plea, then this obligation shall be void; otherwise to remain
31 in full force and virtue.

(Signed) HENRY W. BENJAMIN, [L. S.]
By J. D. ROUSE, *His Att'y.* [L. S.]
(Signed) ISIDORE NEWMAN, SR. [L. S.]

Signed, sealed, and delivered in the presence of—
—— ——.

Bond approved.

(Signed) DON A. PARDEE,
Circuit Judge 5th Circuit, Presiding in Circuit Court of Appeals.

Endorsed: Filed May 23, 1896. J. M. McKee, clerk.

32 *Opinion of the Court.*

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

(Filed April 28, 1896.)

HENRY W. BENJAMIN, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee. } No. 465.

Appeal from the United States circuit court, eastern district of Louisiana.

Before McCormick, circuit judge, and Boarman and Speer, district judges.

SPEER, district judge, delivering the opinion:

33 In this cause the averments upon which plaintiff relied to maintain the jurisdiction of court are made in the following amendment: "By leave of court first had and obtained, the complainant comes now and amends his bill herein by inserting at the end of the sixteenth paragraph and before the seventeenth paragraph thereof, on page 14 of said bill, the following averment, viz: 'And your orator avers that *each* of said persons in whose favor said claims accrued and to whom said certificates were issued are now and were on the 9th day of Feb., 1891, citizens respectively of States other then the State of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness represented by said certificates, if no assignment or transfer thereof had been made.'

Wherefore complainant prays as he hath already prayed, and that

said defendants be required to answer this amendment on or before the next rule day, and for general relief.

(Signed) ROUSE & GRANT,
Solicitors for Comp'l."

The circuit court upon demurrer to the bill held that the proper diversity of citizenship to give jurisdiction was not properly alleged, and held further that the plaintiff's bill was defective for want of equity. We do not think that the jurisdiction of the circuit court was made to appear. It must affirmatively and plainly appear. The defendant being a corporation of the State of Louisiana, the plaintiff, the assignee of a number of claims transferred to
34 him by persons who were members of the late Metropolitan police of this city, may not sue in the circuit court unless the assignors themselves could have sued, if no assignment or transfer had been made. The assignors could not have sued unless they had been, at the time of the transfer, in fact, citizens of States other than Louisiana, and it was essential to the jurisdiction of the court that such other State of States be specially designated. The defendant is entitled to actual and definite notice in the plaintiff's pleading of the citizenship or alleged citizenship of each assignor. No fact in the pleadings of the plaintiff in these courts can be more material, for the authority of the court to act depends upon it. It was not sufficient then to say that the assignors were "citizens respectively of States other than the State of Louisiana and competent as such citizens to maintain suit in this court."

Jurisdiction cannot be inferentially averred. Brodley *v.* Rhines, 8th Wallace, 393; Metcalf *v.* Watertown, 128 U. S., 586; Parker *v.* Ormsby, 141 U. S., 85; New Orleans *v.* Benjamin, 153 U. S., 411; Howes *v.* Hunt & Strevell, circuit court of appeals, 5th circuit, decided at this term.

With relation to the decision of the circuit court that the plaintiff's bill was without equity, it is enough to say that since the court had no jurisdiction whatever of the parties, that holding was, we think, superfluous. It was enough to sustain the demurrer, because the necessary diversity of citizenship was not properly alleged.

We therefore affirm the judgment of the circuit court without prejudice to the right of plaintiff to sufficiently present his cause, if any he has, in a court having jurisdiction.

35 United States Circuit Court of Appeals, Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 35 pages, numbered from 0 to 34, inclusive, contain a true copy of the record, pleas, process, proceedings, and all papers in the case of Henry W. Benjamin, appellant, *v.* The City of New Orleans, appellee, No. 466, November term, 1895, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 15 day of June, A. D. 1896.

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 16,319. U. S. circuit court of appeals, 5th circuit. Term No., 188. Henry W. Benjamin, appellant, *vs.* The City of New Orleans. Filed June 17, 1896.

No. 188.

Brief of Rouse & Grant for Appt

Filed Dec. 10, 1897.

DEC 10 18
JAMES H. McKENNE
CL

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 188.

HENRY W. BENJAMIN, *Appellant*,

versus

THE CITY OF NEW ORLEANS.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF J. D. ROUSE AND WILLIAM GRANT IN BEHALF OF APPELLANT.

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 188.

HENRY W. BENJAMIN, *Appellant*,

versus

THE CITY OF NEW ORLEANS.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF J. D. ROUSE AND WILLIAM GRANT IN BEHALF OF APPELLANT.

STATEMENT.

The complainant is an alien, the defendant is a municipal corporation created by the law of Louisiana, and as between the parties the case is within the jurisdiction of the United States Circuit Court, where this suit was originally commenced. The allegations of the original bill were believed to be sufficient to show a controversy arising under the Constitution of the United States, making a case for the jurisdiction of the Circuit Court.

The jurisdiction was assailed upon the ground that the case was not one arising under the Constitution or laws of the United States; and also upon the ground that the suit was one by an assignee to recover the contents of choses in

action, without any averment that the assignors thereof were competent to sue thereon in said Circuit Court, if no assignment had been made.

The jurisdiction of the Circuit Court was maintained, and a decree made in favor of the complainant, from which the defendant appealed to the Circuit Court of Appeals, which court certified among others, the jurisdictional questions to this court, such questions briefly stated being (1) whether the case made by the bill was one arising under the Constitution of the United States, and therefore within the jurisdiction of the Circuit Court, without regard to the diverse citizenship of the parties; and (2) whether the suit was one to recover the contents of choses in action by an assignee so as to exclude the jurisdiction of the Circuit Court.

This Court held that the case was not one arising under the Constitution of the United States, so as to give jurisdiction to the Circuit Court, without regard to the diverse citizenship of the parties, and that it was a suit by an assignee to recover the contents of choses in action without any showing that the assignors might have brought suit thereon in the Circuit Court if no assignment had been made, and therefore said court was without jurisdiction (153 U. S. 411).

Upon the receipt of the mandate from this Court, the Circuit Court of Appeals reversed the judgment of the Circuit Court, and ordered that court to dismiss the bill, unless by proper averment and in accordance with the views expressed by this Court the jurisdiction of said Circuit Court should be made affirmatively to appear. The mandate of the Circuit Court of Appeals having been filed in the Circuit Court, the complainant amended his bill, by inserting at the end of the sixteenth paragraph, and before the seventeenth paragraph thereof (see page 6 of record of the present appeal), the following averment, to-wit: "And your orator avers, that all of said persons in whose favor said claims accrued, and to whom said certificates were issued, are now, and were, on the 9th day of February, 1891, citizens respectively of States other than the State of Louisiana, and competent as such citizens to

maintain suit in this Honorable Court against the defendant for the recovery of said indebtedness represented by said certificates, if no assignment or transfer thereof had been made."

The defendant demurred generally and specially to the bill as amended, alleging as special grounds of demurrer that the case is not one of equitable cognizance, "and that the amendment is defective and not sufficient to require this defendant to plead, or answer thereto, it being essential that the amendment should state the names and residences and the citizenship of the persons to whom the warrants and certificates issued and to whom accrued the claims against the Metropolitan Police Board who are averred by the amendment to be now and to have been citizens of States other than Louisiana, * * * * * and whose aforesaid warrants, certificates and claims the amendment alleges the complainant acquired; and said statement, besides being essential as a jurisdictional averment in the bill, is requisite also to apprise defendant of the testimony proposed to be offered, and enable the defendant to controvert by testimony the allegations of citizenship in the vague and general terms of the amendment" (R., p. 9).

The decree upon the demurrer was, that "said demurrer be maintained and the bill of complaint dismissed with costs" (R., p. 11).

The decree was an adjudication upon the merits of the complainant's case, and might be pleaded as *res adjudicata* to a new bill brought by the complainant for the same cause of action.

Aurora City vs. The West, 7 Wall. 99.

Bissell vs. Spring Valley Township, 124 U. S. 225.

Lyon vs. Perin Manufacturing Co., 125 U. S. 698.

The opinion of the Court is no part of the record and it would be no answer to such plea to show the opinion or the reasons for its judgment. In the language of Judge Wallace in Oglesby vs. Attrill, 20 Fed. Rep. 570: "What the Court said is valuable as a contribution to the general fund of legal learning, but if the Court had given very poor reasons for

their conclusions, the effect of the adjudication would have been the same."

We have, therefore, a case in which a jurisdictional question not at issue was involved together with the merits, in which the Court rendered a final decree disposing of the merits of the controversy.

The complainant, therefore, in accordance with the views of this Court, as expressed in the cases of *McLish vs. Roff*, 141 U. S. 661, and *Smith vs. McKay*, 161 U. S. 355, took an appeal to the Circuit Court of Appeals, where the decree was affirmed, upon the ground that the complainant's averment that his assignors were, at the time the suit was brought, citizens respectively of States other than Louisiana, and competent as such citizens to maintain suit in the Circuit Court if no assignment had been made, was insufficient to show jurisdiction; and also held that the opinion of the judge *a quo*, that the case was not one of equitable jurisdiction, was superfluous (R., pp. 22, 74, Fed. R. 417).

The case being one in which the jurisdiction of the Circuit Court was not "dependent *entirely* upon the opposite parties to the suit, or controversy, being aliens and citizens of the United States or citizens of different States," but depended upon the further fact that the assignors of the complainant possessed such citizenship as would have enabled them to bring suit for the recovery of the contents of the same choses in action in said Circuit Court if no assignment had been made, and, therefore, the decree of said Circuit Court of Appeals not being final, the complainant, by appeal, brought his case to this Honorable Court, and made the following—

Assignment of Errors.

First—Said Circuit Court of Appeals erred in holding that, in order to give jurisdiction of complainant's bill to the Circuit Court, it was necessary for the complainant to aver that the citizenship of the assignors of the certificates on which he sues as assignee was such *at the time the assignment was made* as would have enabled them to sue in the Circuit Court if no assignment had been made.

Second—Said Court erred in holding that, in order to show jurisdiction in the Circuit Court in which complainant's suit was brought, it was necessary to set out and aver specially of what particular State each of the several assignors of complainant's certificates were citizens at the time the suit was brought.

Third—That said Court erred in affirming the decree of the Circuit Court dismissing the bill, when it ought to have reversed the decree in all respects and remanded the case with directions to proceed according to law.

ARGUMENT.

I.

We can not understand how the equitable jurisdiction of the Circuit Court, of the case presented by the bill can be doubted. We supposed that this Court settled that question when this case was before it upon certificate from the Circuit Court of Appeals. The discussion was then directed to the question whether or not the equitable case presented by the bill was one arising under the Constitution, so as to give jurisdiction to the Circuit Court, without regard to the diverse citizenship of the parties. In considering this aspect of the case, this Court expressly held that—

" The jurisdiction in equity in this case is found in the inadequacy of the remedy at law, either because the rights claimed can not be enforced at law, or because they could not be administered in that forum. The bill was manifestly framed to bring the case within the class in which receivers are appointed to collect the assets and pay the creditors of a dissolved corporation " (153 U. S. 428), *Broughton vs. Pensacola*, 93 U. S. 266, 268, *and Merriweather vs. Garrett*, 102 U. S. 472, 527, being cited and followed.

Thus admitting the jurisdiction in equity of the case presented by the bill, the argument of the opinion was directed to show that there had been no impairment of the obligation of a contract by the legislation of Louisiana; and that there-

fore there was no constitutional question in the case, authorizing the complainant to invoke the jurisdiction of the Circuit Court *upon that ground*. And this court being "of the opinion that the case made upon the bill and answer did not really and substantially involve a dispute, or controversy, as to the effect or construction of the Constitution, upon the determination of which the result of the suit depended," for that reason denied the jurisdiction of the Circuit Court, and not because the case was one of which a court of equity could not take cognizance.

In New Orleans vs. Gaines' Administrator, 131 U. S. 191, it was held that under the jurisprudence of Louisiana the creditor may exercise the right of action of his debtor, a right analogous to the garnishee, or trustee process in some States, and this right could be enforced in the Federal Court in a suit in equity, on the principle of subrogation. This equitable right was disclosed by the bill. The averments of the bill are: That the several defendants are liable to the Police Board for balances due upon the apportionments for police expenses, for which they were respectively liable to said Police Board; that said board had no other assets at the time of its dissolution; that the just proportion due by each of the defendants should be adjusted; that the liabilities of the said Board of Police should be fixed and determined and paid out of said assets, and that if the same exceeded the liabilities of the board, as alleged, said defendants should be required to pay their *pro rata* shares thereof. It was also averred, that because the city of New Orleans had been compelled to receive police warrants in payment of taxes, she had thus paid more than her just proportion of police expenses (seventeenth paragraph of the bill, R., p. 6).

These facts show the impossibility of determining the *pro rata* liabilities of the several corporations embraced within the police district, to the Board of Police, in an action at law. as well also the impossibility of the liability to any particular creditor of the Police Board, being determined in an action at law, against the city of New Orleans (or any other defendant) in a suit for the recovery of the amount due him;

and therefore that the complainant can have no relief except in a court of equity.

The Metropolitan Police District, over which the Metropolitan Board had jurisdiction, included not only the territory embraced in the city of New Orleans, but also that embraced in the parishes of St. Bernard, Jefferson and the city of Kenner, as well. Therefore, it will not do to say that when the Metropolitan Board of Police was abolished, the city of New Orleans became its successor. The repealing act (La. Acts, extra session 1877, p. 57) made no provision for transfer of its power, in part or in whole, to any of the municipal corporations over which it had jurisdiction, and it might as well be said that the city of Kenner, or the parish of Jefferson, or the parish of St. Bernard, was the successor of the board, and that an action at law would lie against either of them for its debts, as to say that an action at law against the city of New Orleans would lie therefor. The necessity of joining all the corporations as defendants in one suit in equity, to determine their respective liabilities to the board and to provide for their apportionment thereof to the whole debt, in such proceeding is manifest.

That the facts stated in the bill show that the complainant is entitled to relief seems to us so plain as to require no discussion, yet the judgment upon the demurrer determines the contrary, which we believe to be manifest error.

II.

The complainant being an alien, and the defendant a citizen of the State of Louisiana, the case is within the jurisdiction of the Circuit Court by reason of the diverse citizenship of the parties, unless it is within one of the exceptions named in the judiciary act. The limitation upon the exercise of jurisdiction in certain cases is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such

instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such Court to recover the said contents if no assignment or transfer had been made" (25 Stat. at Large, 434).

The amendment to the bill avers that the assignors of the certificates sued upon were, at the time the suit was brought as well as when the amendment was filed, citizens respectively of States other than the State of Louisiana, and competent, as such citizens, to maintain suit against the defendant for the recovery of said indebtedness if no assignment or transfer thereof had been made. This brings the case within the very letter of the statute. The opinion of the Circuit Court of Appeals that the assignors could not have sued in the Circuit Court unless they had been, *at the time of the transfer*, citizens of other States is manifest error. It has been so often held that the jurisdiction of the Court in such cases is determined by the conditions existing at the time the suit was brought that it is unnecessary to cite authorities to that effect.

It was asserted and maintained in the court below, that in order to bring the case within the jurisdiction of the Circuit Court, it was necessary to set out and aver specially the citizenship of each and every assignor of the certificates sued upon. We know of no law, or decision of any court, requiring such particularity of averment, and none has been pointed out. The averment of the bill, as amended, clearly makes a case within the jurisdiction of the court. If the defendant desired to join issue on the averment of the citizenship of the assignors of the claims sued upon, it is possible that, by proper pleading, he might have required such citizenship to be specifically set out and averred; but this we do not admit. While it is customary, and perhaps proper, to aver specifically the citizenship of *the parties* to a suit in the Circuit Court, the object of thus pleading is to enable the defendant to join issue upon the averment of citizenship of either the plaintiff or defendant, and try the question of jurisdiction upon plea in abatement in the first instance; and if the plea be maintained, avoid other defence. But the averment of the amended bill can not be met by a plea in abatement, becaus

the jurisdiction of the court is apparent upon the face of the bill from the averment of diverse citizenship, which is only aided by the amendment, showing that the assignors of the certificates sued upon had also such citizenship as would have enabled them to sue in the Circuit Court upon the same obligations if no assignment had been made. Whether or not such assignors possessed the citizenship averred in the amended bill can only be tried with the other issues in the case after the same shall be joined by plea or answer to the bill, as amended; and if denied, the burden of proof will be upon the complainant to show such citizenship, when the instruments and assigments thereof are offered under the pleadings.

Bradley vs. Rhine's Administrators, 8 Wall. 393.

If the citizenship of the assignors in any particular State or States had been sufficiently averred, the complainant would be bound to do no more than establish that they were citizens of some of the States other than the State of Louisiana. Thus, if the averment had been, that the assignors were citizens of Alabama, and the proof should show that they were citizens of Mississippi, or New York, it would not oust the jurisdiction. The complainant might well be mistaken as to the particular State of which his assignor was a citizen. The question therefore raised by the demurrer, is not the sufficiency of the averment to show jurisdiction in the Circuit Court, but whether or not the defendant is entitled to a more specific averment of the citizenship of the assignors before pleading to the bill. This is a new question, and it must be decided on principle without the aid of authorities.

But as the status of the various assignors is a fact which must be established by the complainant, like any other issuable fact in the case, the averment of the bill is sufficient to let in proof, especially as from the character and nature of the fact the defendant is not called upon to meet it by any special plea, but may have full benefit of the defence by disclaiming knowledge and requiring proof. The issue is collateral to the merits of the case, and the defendant can not require a mere incident involved in a suit, which by his de-

murrer he admits to be true, to be set out with useless particularity. Moreover, the true issue is not whether the assignors were citizens of a particular State—it is enough that they were, at the time the bill was filed, citizens of any other State than the State of Louisiana. It has been held that "if an alien should sue a citizen, and should omit to state the character of the parties in the bill; though the Court could not exercise its jurisdiction while this defect in the bill remained; yet it might, as is every day's practice, be corrected at any time before the hearing, and the Court would not hesitate to decree in the cause."

Conolly et al. vs. Taylor et al., 2 Peters, 565.

And see Waters vs. Barril, 131 U. S. App. LXXXIV.

So it is not essential to the maintenance of the jurisdiction of the Circuit Court, in a case arising under the Constitution, that the pleadings should refer in words to the particular clause of the Constitution relied on, but it is sufficient to show that the suit is one of which the Circuit Court is entitled to take cognizance.

Hanford vs. Davies, 163 U. S. 280.

It has been repeatedly held by this Court that a suit can not be properly dismissed by the Circuit Court of the United States, as not substantially involving a controversy within the jurisdiction of the Court, unless the facts, when made to appear on the record, create a legal certainty of that conclusion.

Barry vs. Edmonds, 116 U. S. 550.

Deputron vs. Young, 134 U. S. 252.

It follows from this that a case shown to be within the jurisdiction of the Court, although the jurisdictional fact be defectively stated, can not be rightfully dismissed for want of jurisdiction. As stated by Chief Justice Marshall in Conolly vs. Taylor, *supra*, the averment, if defective, may be corrected at any time before the hearing.

The Circuit Court in disposing of the case under the pleadings, even if it had dismissed the bill on the special grounds set up in the demurrer that the averments of the bill did not specifically name the particular State of which each assignor

was a citizen, did not in fact decide a jurisdictional question, which could have been certified under the fifth section of the act of 1891, for the effect of the special demurrer was to call for a bill of particulars, which is a question of pleading and not of jurisdiction. The defendant called for this specific statement so that he might plead to the jurisdiction or not, as he might elect. As the decree of the Circuit Court disposed finally of the merits, and incidentally only of a question of pleading, it is clear that there was no jurisdictional question which could be taken up under the sixth section. The case here therefore is one in which the jurisdiction of the Circuit Court did not depend entirely on the citizenship of the parties to the record, and in which that Court did not decide the other question upon which it also depended.

The question being in the case, but not decided, the case was rightfully appealed to this Court under Sec. 6 of the Act of March 3, 1891.

The statement accompanying the questions heretofore certified, that the assignors of the certificates "*were* citizens of Louisiana" (153 U. S. 417), led this Court to say in its opinion (*Ibid.*, p. 435) that it affirmatively appeared that the suit could not have been maintained by them if no assignment had been made.

The language of the certificate relates to the past, and the fact that they *were* once citizens of Louisiana does not conclude the complainant from showing *that at the time the suit was brought* they were citizens of other States, as averred by the amendment to the bill.

Wherefore the appellant prays that the decree appealed from be reversed and the cause remanded to the Circuit Court to be proceeded with according to law.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 188.

HENRY W. BENJAMIN, APPELLANT,

versus

THE CITY OF NEW ORLEANS ET ALS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SYLLABUS.

Where, in the Circuit Court, the jurisdiction is in issue and is denied, the plaintiff must elect whether he will bring the case to the Supreme Court on the question of jurisdiction alone, or carry it to the Circuit Court of Appeals, upon all the questions involved; the judgment of the Court of Appeals in such latter case can only be reviewed in this court upon a certificate from the former.

McList vs. Raff. 141 U. S. 661–668.
Interior Const. Co. vs. Gibney, 160 U. S. 219.
Chappell vs. United States, 160 U. S. 207.
Warner vs. New Orleans, 167 U. S. 474.
United States vs. Jahn, 155 U. S. 109.

No writ of error lies from this court to the Court of Appeals in any case where the judgment or decree of the latter is final, under section 6 of the act of 1891.

Aztec Mining Co. vs. Ripley, 151 U. S. 80.

Such judgments or decrees are final in every case where federal jurisdiction is founded on the diversity of citizenship of the parties.

United States vs Jahn, 155 U. S. 109.
Rouse vs. Letcher, 156 U. S. 47.
Gregory vs. Van Ee, 160 U. S. 643.
Carey vs. H. and T. Rwy., 161 U. S. 116–133.
Colorado Co. vs. Turck, 150 U. S. 138–144.
Bordmeyer vs. Idler, 159 U. S. 408–415.
Rouse vs. Hornsby, 161 U. S. 588.
Press Pub. Co. vs. Monroe, 164 U. S. 105.

The averment of the bill setting out the citizenship of the parties should be clear and precise; it cannot be made inferentially; where the jurisdiction depends upon the citizenship of one of the parties, plaintiff or defendant, the name of the State in which his citizenship is held must be set out; it is not sufficient to declare that he is a citizen of a State other than that of which the plaintiff or defendant, as the case may be, is a citizen.

Bradley vs. Rhines, 8th Wallace, 393.
Metcalf vs. Watertown, 128 U. S. 586.
Parker vs. Ormsby, 141 U. S. 85.
New Orleans vs. Benjamin, 153 U. S. 411–433.

STATEMENT OF CASE.

On February 9th, 1891, complainant filed his bill in the Fifth Circuit Court for the Eastern District of Louisiana, for an account of all the debts, liabilities and unpaid dues of the Board of Metropolitan Police, created by an act of the General Assembly of the state of Louisiana, No. 4, approved September 14th, 1868; including certain warrants, certificates and claims set out in the bill, and for a like account of the amounts due by defendants, the cities of New Orleans and Kenner, and the parishes of Jefferson and St. Bernard, to the said Board, for the balance of unpaid apportionments of police expenses, as well as all poll taxes collected by the defendants, and withheld from the said Board; that the former be decreed to pay into the hands of a receiver, to be appointed, their several pro rata shares of the amounts so found to be due to the creditors of the said Board of Metropolitan Police, including all costs of the administration thereof, and that the funds thus realized be applied to the payment of the war-

rants, certificates and claims sued on by complainant, and those of such other persons who may be creditors of the Board, who shall come in and establish their claims.

The warrants, certificates and claims held by complainant are described in an exhibit annexed to the bill, and appear to be salaries earned by police officers, and other employees of the Police Board, during the month of December, 1874.

The bill sets up, that by the act of the legislature of Louisiana, No. 74, of 1868, the parishes of Orleans, Jefferson, and St Bernard, were united in a district, called the Metropolitan Police District of New Orleans, State of Louisiana; that the government of the district for police purposes was vested in a Board of Commissioners styled the Board of Metropolitan Police; said Board was authorized to appoint all officers and employees of the force, whose salaries were to be paid monthly; that the Board was required to make an annual estimate of the expenses of maintaining the force, and to apportion the same among the several cities and parishes composing the district, which were required to provide the means of paying and to pay the amounts of such apportionments; that the apportionments made by the Board for the city of New Orleans, for the years 1869 to 1876, inclusive, amounted to $6,155,697.74, and that said apportionments so made and notified to the city New Orleans made it liable to the Board for the amount thereof; that similar apportionments were made to the cities of Jefferson and Carrollton, which were afterwards by legislation consolidated with the city of New Orleans, which by the same was made liable for their debts, including the said apportionments; that like apportionments were made for the parishes of Jefferson and St. Bernard, and the city of Kenner, which were thus likewise made the debtors of the said Board for the amount of such apportionments; that the said cities and parishes were authorized to raise by taxation the sums necessary to pay their respective assessments; that such tax levies were made; that the city of New Orleans, during the period named, included the amount of her apportionment in the annual budget of expenditures, and levied taxes for the purpose of paying the same, out of which she collected and paid large sums of money on account of her pro rata, but not enough to discharge the same, there still being due on account thereof $940,379.60.

That by the provisions of an act of the legislature of Louisiana, approved February 7th, 1869, and other acts, all warrants issued for the salaries of officers, employees and members of the Metropolitan Police, and for the expenses of the said Board, were made receivable for all parish and municipal taxes and licenses in the district, and for all taxes due and to become due in the said parishes and cities, not exceeding in any one the amount of its respective apportionment for that year; that the said Board, pursuant to the said act of 1869, organized a metropolitan police force for the district, and appointed officers and members thereof, who rendered services under contract therewith, and were paid the salaries fixed by law for such employees, such contracts being made upon the faith of its revenues applicable to their payment.

That by an act of the legislature (No. 35), approved March 31st, 1877, the said act of 1869, establishing said district and creating said Board, the said act of 1869 making the said warrants receivable for municipal and parish taxes and debts, an act (No. 94) of 1870 providing means for the payment of the several apportionments mentioned, and an act (No. 16) of 1875, being one to enforce the payment by the city of New Orleans, and the other cities and parishes composing the district, of their several apportionments, as well as all other acts amendatory of those named, or upon the same subject matter, were repealed, and the said Board of Metropolitan Police abolished, and no provision made for the liquidation of its affairs, of payment of its debts.

That the said repealing act of 1877 was in violation of Section 10, Article 1, of the Constitution of the United States, in that it impaired the obligation of the contracts made by the said Board, particularly those sued upon; that the city has, ever since the passage of the said repealing act, continued to collect the said taxes, which are applicable to the payment of the city's indebtedness to the said Board and ought to be distributed among the creditors of the same; that the Board was a body corporate, which by the repeal of the said laws ceased to exist, and had and has no representative or successor, against which suit might be brought for the establishment of plaintiff's demands, and that he is without remedy except in a court of equity, where

matters of such kind are cognizable; that a receiver had been appointed to collect from the city of New Orleans certain apportionments due by it, and to apply the same to outstanding liabilities of the said Board, the appointment of which receiver was afterwards rescinded, before he acted, and that the said Board was now without any successor or legal representative, and that its affairs were no longer under any administration whatever; that a certain suit was brought by one Goldstein, for the appointment of a receiver, and the enforcement of the liabilities of the said several cities and parishes, which suit was afterwards dismissed as to the city of New Orleans, on the ground of want of jurisdiction in the court.

This case was before your Honors in the October term of 1893, upon a certificate of the United States Circuit Court of Appeals for the Fifth Circuit, under section 6 of the judiciary act of March 3d, 1891.

See New Orleans vs Benjamin, 153 U. S. 411.

The questions, four in number, were as follows:

First. Does the case made by the bill alleging that the Board of Police has been abolished and left without a successor or legal representative and no provision has been made for the application of its assets to the payment of its debts and the answer herein, constitute a suit in equity arising under the Constitution of the United States and within the jurisdiction of the Circuit Court of the United States for the Eastern District of Louisiana without regard to the diverse citizenship of the parties?

Second. The warrants and certificates held by the complainant having been issued for services rendered and supplies furnished under the contract with the Board of Metropolitan Police, when the laws required said warrants and certificates to be received by the defendants in payment of all licenses, taxes and other dues, and all such laws having been repealed by the legislature of Louisiana without making other provisions for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of Article 1, Section 10 of the Constitution of the United States?

Third. Do the pleadings show a suit to recover the contents of choses in action within the meaning of the judiciary acts of

1887 and 1888, so as to preclude the complainant, as assignee, from suing in the Circuit Court of the United States, to establish a fund out of which he, in common with other creditors of the late Metropolitan Police Board, may be paid pro rata upon their claims?

Fourth. Considering all the allegations in the bill of complaint and the provisions in the constitution and laws of Louisiana respecting the Metropolitan Police Board, and the metropolitan police warrants and certificates and the redemption and payment of said certificates, does the case show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond the liability for taxes assessed and collected in pursuance of the apportionment made?

As will be seen, the two first questions may be reduced to one, namely, whether the suit was one of which the Circuit Court had jurisdiction, without regard to the diverse citizenship of the parties? The third sought to ascertain whether the complainant, an assignee, could sue in the Circuit Court, although his assignors could not. The fourth propounded the broad question whether or not the record disclosed a case of absolute liability on the part of the city, beyond that for taxes actually collected by it. The answer to the first question, if in the negative, necessarily involved the second, as, if it were held that the suit was not one arising under the Constitution of the United States at all, it would be useless to inquire afterwards whether it arose under a particular section thereof, namely, section 10 of article 1. If, after the negative answer above made to the first question, which necessarily involved the second, an affirmative answer to the third question would dispense with any necessity at all of an answer to the fourth, which would only become pertinent if, in the event that after considering the first three questions, this court should have held that the Circuit Court had jurisdiction.

By reference to your Honors' decision, 153 U. S., p. 431, it will be seen that the first question was answered in the negative, and that such conclusion covered the second question, which answers to the two was in effect that the suit was not one which involved a dispute or controversy as to the effect or construction of the Constitution of the United States, and hence

did not arise thereunder; the third question was answered in the affirmative, that there was involved no question which would give the Circuit Court jurisdiction, without regard to the diverse citizenship of the parties, the bill containing no averment that it would have been maintained by the assignors had no assignment been made; the answers to the three questions thus given made unnecessary any consideration of the fourth question.

After the finding of this court had been placed of record in the Circuit Court of Appeals for the Fifth Circuit, the latter court dismissed the bill, with leave, however, to amend the same, by setting forth the requisite averment to show jurisdiction, by reason of the diverse citizenship of the parties; thereupon, on April 27th, 1895, complainant amended his bill, by inserting at the end of the sixteenth paragraph, and before the seventeenth paragraph, the following averment:

"And your orator avers that each of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th of February, 1891, citizens respectively of states other than the state of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made."

The motion to dismiss or affirm is made under the following paragraphs of section 5 and 6 of the act of March 3, 1891, known as the "Circuit Court of Appeals Act:"

Section 5. "That appeals or writs of errors may be taken from the District Courts, or from existing Circuit Courts, to the Supreme Court, in the following cases. * * In any case where the jurisdiction of the court is in issue; in such cases the question of the jurisdiction alone shall be certified to the Supreme Court from the court below, for decision."

Section 6. "That the Circuit Courts of Appeal established by this act shall exercise appellate jurisdiction to be reviewed by appeal or writ of error; final decisions in the District Courts and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeal shall be final, in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the controversy being aliens and citizens of the United States, or of different states. * * * *"

As has been seen, your Honors have already decided that this suit is not maintainable in the Circuit Court, by reason of its being an equity case, arising under the Constitution of the United States, nor on the ground particularly that the statutes in question are an impairment of the obligation of the contract asserted by complainant; the amended bill under which the controversy is brought here ~~by a writ of error~~, seeks to show jurisdiction by reason of the diversity of citizenship of the parties; the demurrer, which was sustained by the Circuit Court, raised two questions, first, whether there was jurisdiction in the Circuit Court, and in the alternative, whether the bill presented any equity; the Circuit Court found that the amended bill contained no averment sufficiently setting forth the citizenship of the assignors of complaint, and hence, that it had no jurisdiction of the case.

The first point made by the motion to dismiss or affirm is that under the first clause of section 5 of the act of 1891, this court has no jurisdiction of the present writ of error; that primarily the only mode by which such questions can be reviewed here is on certificate from the court of original jurisdiction, namely, the Circuit Court; in which event, such question alone must be certified from that court; here the complainant, instead of following the course pointed out by the statute, carried the case ~~by writ of error~~ to the Circuit Court of Appeals for the Fifth Circuit, from which court, after meeting with an adverse decision on his plea of jurisdiction, he seeks to bring the case by writ of error to this court. Your Honors have said, that in a case of this character the complaining party must elect whether or not he will bring his case to this court on the question of jurisdiction alone, or carry it to the Circuit Court of Appeals upon all the questions involved; that the act of 1891 did not contemplate several separate appeals in the same case at the same time, to two appellate courts; and while it is true that complainant's recourse, both to this court and the Court of Appeals are not concurrent or simultaneous, the rule laid down finds clear application, where relief is vainly sought first from the Court of Appeals and afterwards from this court, by writ of error to the former.

McLish vs. Roff, 141 U. S. 661-668.

The jurisdiction of the Circuit Court being at issue, by formal

pleading made in that court, the only mode by which the court's finding upon that question could reach this court by initiative in the inferior courts would be, first, by a certificate from or writ of error to the Circuit Court, under paragraph 2 of section 5 of the act of 1891.

Interior Construction Co. vs. Gibney, 160 U. S. 219.

Chappell vs. United States, 160 U. S. 207.

Second, by certificate from the Circuit Court of Appeals, under the first paragraph of section 6, where it is provided, that in any case where the jurisdiction of the Court of Appeals is final, it may certify to this court questions or propositions of law concerning which it desires instructions.

Warner vs. New Orleans, 167 U. S. 474.

United States vs. Jahn, 155 U. S. 109.

There can, under no circumstances, be a writ or error from this court to the Court of Appeals, because such proceedings, by paragraph 3 of section 6 is limited to such cases, as by paragraph 1, *are not made final* in the Court of Appeals.

Aztec Mining Co. vs. Ripley, 151 U. S. 80.

The present suit being one in which federal jurisdiction is sought on the ground of the diversity of citizenship of the parties alone, *is made final* in the Court of Appeals by the express terms of the first paragraph of section 6.

In the present case it is attempted to bring the case here by ~~writ of error~~ to the Circuit Court of Appeals.

In United States vs. Jahn, 155 U. S. 109, it was held, that if the jurisdiction of a Circuit Court is at issue, and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified, and take his appeal, or writ of error, direct to this court; the contention there was that the jurisdiction was not at issue in the Circuit Court, and even if it had been, it could only be certified by that court to this court; that an appeal having been taken to the Court of Appeals, the action of the Circuit Court, maintaining its jurisdiction, was final, could not be there reviewed, and hence, could not by that court be certified here; under that clause of the act which gave the Circuit Court of Appeals the right to certify to this court any case within its jurisdiction, your Honors maintained that the certificate of the Court of Appeals brought the case properly before you.

The revisory power of this court and of the Circuit Court of Appeals, under the act of 1891, is to be exercised only in accordance with its provisions.

United States vs. Jahn, 155 U. S., p. 109.

Second. By section 6 of the act of 1891, it is provided, that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases where jurisdiction is dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different states; a decree or judgment in such a suit is not reviewable by this court.

It will be remembered, that plaintiff, having failed to sustain the jurisdiction of the Circuit Court on the ground that this cause is one in equity, arising under the laws of the United States, or maintaining in a Circuit Court, on the ground that the legislative acts set out in the bill were an impairment of the so-called contract sued upon, then sought federal jurisdiction on the ground that his assignors were citizens of states other than Louisiana, of which defendant is a citizen. This course was adopted under the authority of a reservation granting leave for the same in the decree of the Court of Appeals, and complainant has filed his amended bill, setting up diverse citizenship of the parties, confessedly for no other purpose except to show jurisdiction in the Circuit Court. The case is clearly within that class in which decrees of Circuit Courts of Appeal are final, and not subject to review here.

In Rouse vs. Letcher, 156 U. S. 47, as intervenor in a foreclosure suit brought his action against the receiver for damages. The court held that the intervention was a proceeding against property *custodia legis*, and hence that it was simply ancillary or supplemental to the original suit, of which jurisdiction was taken solely on the ground of the citizenship of the parties. The court held that in such class of cases the judgment of the Court of Appeals was final; and the appeal was dismissed.

In Gregory vs. Van Ee, 160 U. S. 643, the court reached the same conclusion, upon substantially the same facts:

See also Carey vs. Houston & Texas Railway, 161 U. S. 116–133; Colorado Central Co. vs. Turck, 150 U. S. 138–144; Bordmeyer vs. Idler, 159 U. S. 408–415; Rouse vs. Hornsby, 161 U. S. 588; Press Publishing Co. vs. Monroe, 164 U. S. 105.

If, however, the court should be of the opinion that this case is before it, and can be considered, the judgment of the Court of Appeals is manifestly correct; the averment of citizenship is vague and general to that degree that it is barely a skeleton compliance with the law; the averment is that the assignors of complainant were, at the time of the institution of this suit, citizens of states "other than Louisiana;" if the complainant himself were suing in his own right, and in setting forth his citizenship merely declared that he was a citizen of a state other than Louisiana, without naming it, the averment would be insufficient; the allegation upon this point must be one of fact, and specifically made; it must set out the name or names of the state or states of which the assignors were citizens; complainant is not allowed to keep this information to himself; the allegation must be such as leaves no doubt as to the requisite citizenship of all parties; it must appear affirmatively, and not by inference.

Brodley vs. Rhines, 8th Wallace, 393.
Metcalf vs. Watertown, 128 U. S. 586.
Parker vs. Ormsby, 141 U. S. 85.
New Orleans vs. Benjamin, 153 U. S. 411-435.

Should the defendants desire to traverse the averment of the bill that complainant's assignors were citizens of states other than Louisiana, and competent to sue in the Circuit Court, in what manner are they put upon warning as to what facts they are to controvert, by the vague and indefinite allegation of the bill? In what states of the Union would they seek for evidence to show that the assignors were not citizens of the states which complainant had in mind when his averment was made? As plain as any fact can be, defendants would be left to grope in the dark in this respect, being unable to anticipate whatever they would be required to meet.

It is clear that to sustain the bill in the Circuit Court on the ground of diverse citizenship, the citizenship of the alleged assignors should have been averred; true, in the discussion on the questions certified to this court, the complainant sought to escape the jurisdictional requirement by the contention that the bill did not seek the recovery of the contents of a chose in action, but the decision of the court was against that contention. 153 U. S., pp. 434 and 435.

The original holders of these warrants were the hundreds of the Metropolitan Police, every one of whom was required to be a citizen of the state of Louisiana. Act No. 74 of 1868, Section 8.

In the long lapse from 1874, when the warrants were issued, and 1891, when the suit was brought, there must have been a complete extinction of all citizenship of many of the original holders in the grave; it is not alleged that any of them survived in 1891; that the complainant had the least knowledge of their citizenship, if any were citizens of states other than Louisiana; with this difficulty the complainant attempted to aver the diverse citizenship of all the police officers, by whom it was alleged that warrants were assigned by the loose general averment that all of the parties in whose favor said claims accrued, i. e., those to whom the warrants were issued, were in 1891 "citizens of states other than Louisiana;" and on this averment the bill was sought to be sustained in a controversy between the defendant, the city of New Orleans, and holders of choses in action assigned to them by citizens of other states.

The defendant naturally demurred to the bill on the ground that there was no sufficient averment of the citizenship of the police officers, the alleged assignors of complainant and the intervening holders; this averment of citizenship may be disputed, and must be proven if denied.

See 8th Wallace, 397; 19th Wallace, 81; 16th Peters, 351.

How could defendant be prepared to dispute, by proof, the loose and general allegation that did not allege the citizenship of each of the assignors by naming the state of his citizenship? The whole question in the case was, whether the random, general allegation in the bill of the citizenship of the assignors was sufficient; the Circuit Court sustained the demurrer, and the inquiry is whether a loose allegation shall suffice, when the law requires it to be specific; if this court can review the judgment of a Circuit Court of Appeals on a question of this character, it is submitted the decision is correct.

It will be noticed that the averment of the citizenship of the assignors of complainant is set up as it was on the 9th February, 8191, the date of the filing of his original bill; there is no averment as to the citizenship of the original holders of the claims from whom complainant acquired, at the date of their acquisi-

tion by the latter; it would thus appear that in complainant's theory if, at the time he filed his bill, his assignors were citizens of states other than Louisiana, he would be competent to sue in the Circuit Court, although at the date of the assignment under which he holds, which was necessarily prior to the filing of his bill, his assignors were citizens of the state of Louisiana, and hence incompetent to sue.

It will be observed, that by section 8 of act 74 of 1868, all officers and employees of the Metropolitan Police Force were required to be citizens of Louisiana, and hence it must be conclusively presumed that the assignors of complainant were citizens of that state, and continued to be such until a change of citizenship shown. At the most, the averment of the bill would show that the assignors retained their Louisiana citizenship up to the date of the filing of the bill, from which it would obviously appear that they were citizens of Louisiana at the time that their claims were assigned to complainant.

But if the allegation of citizenship as found in the bill were sufficient in form to show jurisdiction in the Circuit Court, defendant is entitled to have it made more specific. The averment as it stands assumes the whole question, so far as it depends upon the diverse citizenship of the parties. Not only the defendant, but the Circuit Court itself is entitled to know of what states the assignors were citizens, and the bill should contain a specific averment to this fact.

Should this court have any jurisdiction to review the judgment of the Court of Appeals, it should be affirmed.

Respectfully submitted,

BRANCH K. MILLER,

Solicitor for Defendants and Appellees.

NOVEMBER, 1897.

FILED,
JAN 13 1898
JAMES H. McKENNEY,
CLERK

No. 188.

Statute filed by appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 188.

HENRY W. BENJAMIN, APPELLANT,

vs.

THE CITY OF NEW ORLEANS.

ACTS OF LOUISIANA, 1868.

* * * * * *

No. 74.

AN ACT to establish a Metropolitan police district and to provide for the government thereof.

SECTION 1. *Be it enacted by the senate and house of representatives of the State of Louisiana in General Assembly convened*, That the parishes of Orleans, Jefferson and St. Bernard are hereby constituted and territorially united for the purposes of police government and police discipline therein, into one district, which shall be known and called "the Metropolitan police district of New Orleans, State of Louisiana."

SEC. 2. *Be it further enacted, etc.*, That the powers and duties connected with and incident to the police government and discipline of the said district shall be as hereinafter more especially provided for, vested in, and exercised by a board, consisting of five commissioners, one to be a resident of the city of Jefferson, to be styled the board of Metropolitan police, and by a Metropolitan police force composed of a superintendent of Metropolitan police force, surgeons of Metropolitan police force, captains of Metropolitan police force, sergeants of Metropolitan police force, corporals of Metropolitan police force, patrolmen of Metropolitan police force, clerks and doormen of Metropolitan police force.

SEC. 3. *Be it further enacted, etc.*, That the said commissioners of Metropolitan police shall be appointed by the governor of the State of Louisiana, with the advice and consent of the senate, and shall hold and occupy the said offices of commissioners for the term of office of the governor who may appoint them; *Provided*, That the commissioners so appointed shall continue to hold office until their successors shall have been duly appointed and qualified. Not less than three of the said commissioners shall constitute a quorum (but either of the said commissioners may, at any time, be removed by the governor of the State), under the provisions of the statutes relating to the removal from office, which provisions are hereby extended so as to relate to each one of the said commissioners; and in all cases where charges are made against a commissioner, he shall have an opportunity to present evidence in his behalf.

SEC. 4. *Be it further enacted, etc.*, That if any one of the said commissioners of the Metropolitan police, or any member of the police force shall, during his term of office, accept or hold any other place of public trust or civil emolument, or shall, during his term of office, be publicly nominated for any office elective by the people, and if he shall not, within ten days succeeding the same, publicly decline the said nom-

ination, he shall be deemed thereby as having resigned his commission, and be compelled to vacate his office.

SEC. 5. *Be it further enacted, etc.*, That the said Metropolitan police force shall consist of not more than one (1) superintendent or less than two (2) police surgeons, six (6) captains, twenty-four (24) sergeants, — corporals, twenty-four (24) clerks (operators), five hundred and seventy-five (575) patrolmen and forty-four (44) doormen, a superintendent and assistant superintendent of police telegraph.

SEC. 6. *Be it further enacted, etc.*, That the persons severally appointed commissioners of Metropolitan police by virtue of this act shall before exercising any of the duties thereof duly take and file in the office of the secretary of state the oath of office and affidavit of eligibility prescribed for State officers. Immediately upon receiving said oath of office the secretary of state shall issue to each commissioner a certificate of his appointment, whereupon he shall possess the power and exercise the duties of commissioner of Metropolitan police.

SEC. 7. *Be it further enacted, etc.*, That the said board of commissioners shall appoint the superintendent, the police surgeons, the captains, the sergeants, the corporals, the patrolmen, the clerks and the doormen of the said Metropolitan police force, to the number authorized by this act; and the said board of commissioners shall promulgate all rules, regulations and orders to the police force through the superintendent of police, who shall be the executive head of the whole force of the Metropolitan district, and who shall have direction of the said police force, subject to the rules, regulations and orders of the said board of commissioners.

SEC. 8. *Be it further enacted, etc.*, That each officer and member of said Metropolitan police force shall hold office respectively during good behavior, and shall be liable to removal from office or membership of the said police force only after written charges shall have been preferred against him, according to the rules and regulations of the board of

commissioners; but no person shall ever be appointed to office or membership of the said police force who is not a citizen of the United States and of this State, or whoever has been convicted of crime, or who is disqualified by the fourteenth article of the Constitution of the United States, or by the terms of article ninety-nine of the constitution of this State.

SEC. 9. *Be it further enacted, etc.*, That those portions of the Metropolitan police district which contribute to the police fund, and authorize the appointment of patrolmen, shall be divided by the board of Metropolitan police into precincts, not exceeding in the aggregate one precinct to each one hundred of the patrolmen authorized to be appointed. The same board may appoint as many captains as precincts, and assign one captain and as many sergeants, corporals and patrolmen as they shall deem sufficient to each precinct. Any number of said precincts may be joined into a subdistrict by the said board, and assigned to the charge of a police surgeon of police force.

SEC. 10. *Be it further enacted, etc.*, That the board of Metropolitan police shall provide such office and business accommodations as it shall deem requisite for the transaction of its own business and that of its subordinate officers, subject to approval by the auditor of public accounts and treasurer of the State. There shall be a central office in the city of New Orleans, to be known as the "Central department of Metropolitan police."

SEC. 11. *Be it further enacted, etc.*, That vacancies in the police force shall be filled up as follows: Captains must be appointed from among sergeants, and sergeants from corporals, and corporals must be appointed from among patrolmen.

SEC. 12. *Be it further enacted, etc.*, That the board of Metropolitan police may, upon any emergency or apprehension of riot, tumult, mob, insurrection, pestilence or invasion, appoint as many special policemen (without pay) from

among the citizens as it may be deemed proper. During any day of public election it may also appoint to perform duty (in the Metropolitan district) not exceeding five hundred special policemen, who may be paid out of the Metropolitan district fund; three dollars per day will be considered a recompense for such service as policemen; *Provided*, That each special policeman so appointed shall make oath before any commissioner of police, at the time of appointment, that he will not interfere in any manner with the election taking place during the day or days for which he is appointed otherwise than by depositing his own vote, and providing that such pay may be withheld and he may be duly prosecuted as for a misdemeanor if the terms of such oath be violated. And during the service of any such special policeman, authorized as aforesaid, he shall possess all the powers and privileges and perform all the duties, that may be, by order and regulations, from time to time prescribed. Every such special policeman shall wear a badge to be prescribed and furnished by the board of Metropolitan police force.

SEC. 13. *Be it further enacted, etc.*, That no person or persons shall be eligible to or competent to hold the office of commissioner of Metropolitan police except he be a citizen of the district of Metropolitan police and a resident therein.

SEC. 14. *Be it further enacted, etc.*, That the lieutenant governor of the State shall be *ex officio* a member and president of the board of Metropolitan police. He shall preside at the meetings of the board, and whenever a vacancy shall occur in the office of superintendent of Metropolitan police force, and in the absence or disability of the said superintendent, the president shall possess all the powers and perform all the duties of that office, subject to the orders, rules, and regulations of the board of Metropolitan police. And his pay shall be at the same rate as the superintendent during such continuance of duty.

SEC. 15. *Be it further enacted, etc.*, That the members of

the police force of the said "The Metropolitan police district" shall furthermore possess in every part of this State all the common-law power now conferred by law upon constables, except for the services of civil process, and any warrant for search or arrest issued by any magistrate of this State, may be executed in any part thereof by any member of the said "The Metropolitan police district," and all laws and parts of laws conflicting with this provision are hereby repealed.

SEC. 16. *Be it further enacted, etc.*, That the commissioners shall select one of their number to be the treasurer of the Metropolitan police. He shall be the fiscal officer of the Metropolitan district. He shall, on check and voucher, duly disburse, by order of the said police board, for the purpose of this act, all moneys belonging to the Metropolitan police fund, and shall deposit the same when paid to him by the treasurer of the State of Louisiana, in a bank or banks designated by such officer. He shall execute a bond with sureties not less than two conditioned in a penalty of forty thousand dollars to the people of the State of Louisiana for the faithful discharge of his duties as such treasurer; and the said bond shall be approved and filed with the auditor of the State of Louisiana before said treasurer shall enter upon the discharge of his duties. And any collections made on the forfeiture of such bond shall be paid to the credit of the Metropolitan police fund.

SEC. 17. *Be it further enacted, etc.*, That every member of the Metropolitan police force shall have issued to him by the board of Metropolitan police a proper warrant of appointment, signed by the president of the board and chief clerk or deputy clerk, which warrant shall contain the date of his appointment and rank.

SEC. 18. *Be it further enacted, etc.*, That the board of Metropolitan police shall make suitable provisions respecting security to be given by the officers and others under their control. Each member of the Metropolitan police force

shall take oath of office and subscribe to the same before a member of the board.

SEC. 19. *Be it further enacted, etc.*, That the said board of commissioners shall have power in its discretion, on conviction of an officer or member of said police force, for any legal offense or neglect of duty or violation of rules or disobedience of orders, or incapacity, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer, or other breach of discipline, to punish the offending party by reprimand, forfeiture or suspension of pay for a specified time, or by dismissal from the force, but not more than ten (10) days' pay shall be forfeited and withheld for any offense. A record of all fines shall be kept by the treasurer of the board.

SEC. 20. *Be it further enacted, etc.*, That no officer or member of the Metropolitan police force, under penalty of forfeiting the salary that may be due him, shall withdraw or resign, except by permission of the board. Unexplained absence without leave for two (2) days shall be deemed and held to be a resignation by such officer or member and accepted as such.

SEC. 21. *Be it further enacted, etc.*, That the said board of commissioners shall have power to issue subpœnas, attested in the name of its president, to compel the attendance of witnesses upon any proceeding authorized by its rules and regulations. Each commissioner of the board, the superintendent of police, the chief clerk and deputy clerk, are hereby authorized and empowered to administer oaths and affirmations to any person summoned and appearing in any matter or proceeding authorized as aforesaid, or to take any depositions necessary to be made, under the orders, rules and regulations of the board, or for the purposes of this act. Any willful and corrupt false swearing by any witness or person to any material fact, in any necessary proceeding under the said orders, rules and regulations, or

under this act, shall be deemed willful perjury, and punished in the manner now prescribed by law for such offense.

SEC. 22. *Be it further enacted, etc.*, That the said board of Metropolitan police commissioners is hereby invested with and shall hereafter exercise all the powers now conferred by law upon mayors of cities, in respect to requiring the services of the military in aid of the civil authorities to quell riots, suppress insurrection, protect property and preserve public tranquillity; and such investure of power shall exclude that of the mayors of the cities of New Orleans, Jefferson City and Carrollton, within these cities respectively, and such powers shall apply to the whole Metropolitan police district.

SEC. 23. *Be it further enacted, etc.*, That the said board of commissioners, in furtherance of the police government of the said Metropolitan district, and for promoting and perfecting the police discipline of officers and subordinates of the police force, are empowered in their discretion to enact, modify and repeal, from time to time, orders, rules and regulations of general discipline wherein, in addition to such general provisions as may be deemed expedient by the said commissioners, there may be particularly defined, enumerated and distributed the powers and duties and liabilities of the officers, clerks and members of the Metropolitan police force, and wherein shall be declared the modes of appointments to office and procedure of removal from office of the said officers, clerks and members of the said police force, and the whole manner of discipline of the said force: *Provided*, That such by-laws, ordinances, orders, rules and regulations and forms of and modes of procedure shall not conflict with any of the provisions of this act or with the Constitution of the United States or of this State.

SEC. 24. *Be it further enacted, etc.*, That the board of commissioners shall cause to be kept books of record of the police force; of complaints against officers and members, and the judgments of the board thereupon; of time lost by

officers and members; of accounts showing the amount of moneys received and expended, and how and for what purposes received and expended; of the proceedings of the board; of stolen money and property recovered, and the disposition made of the same; of suspected persons and places; of arrests and causes of arrests, and all such other books and records in and for the central office, and in and for the several police offices and stations as shall be required by the business of the department. The board shall also have the power from time to time to establish stations and station-houses and substations and substation-houses for the accommodation thereat of the members of the force, and as may be necessary to the efficient working of the department.

SEC. 25. *Be it further enacted, etc.*, That the superintendent of the Metropolitan police force shall make to the board of commissioners quarterly reports in writing of the state of the department, with such statistics and suggestions as he may deem advisable to submit for the improvement of the police government and discipline of the said Metropolitan district.

The board of commissioners shall, on or before the first Monday in January of each year, make a report in writing to the governor of the State upon the condition of the said Metropolitan police force and the said Metropolitan police district.

SEC. 26. *Be it further enacted, etc.*, That it shall be a misdemeanor, punishable by imprisonment in the State penitentiary for a term not exceeding two years, or by a fine not exceeding five hundred dollars ($500) for any person, without justifiable or excusable cause, to use or to incite any person to use personal violence upon any of the commissioners, officers or members of the Metropolitan police force when in the discharge of their duties, or for any person to make use of abusive or threatening language to any of the said commissioners, officers or members of the said police force, or for any person not an officer or a member of said police

force to falsely represent himself, with a fraudulent design upon persons or property as being such an officer or member or upon any time or day to have, use, wear or display, without authority, any shield, badge, buttons, numbers, or other insignia or emblem such as are officially worn by the officers and members of the Metropolitan police force.

SEC. 27. *Be it further enacted, etc.*, That the board of commissioners, convened as a board of estimate and apportionment, shall on the first Monday after their appointment and annually thereafter proceed to make up a financial estimate of the sums required annually for expenses in the execution of criminal process, supplying for the fitting up, lighting, cleansing, repairing, furnishing of police offices and stations, lockups, houses of detention, for alterations in, addition to and repairs of same, for office fixtures and accommodation, advertising, printing and stationery, police badges, numbers and clubs, beds and bedding for the police force, and for witnesses and prisoners, for support of witnesses and prisoners while in the custody of the police, for secret police service, hack and cab hire, and also for all sums necessary for counsel fees, law expenses and disbursements by the board of commissioners, or rendered necessary in criminal or civil actions and proceedings against the said commissioners or officers or members of the force for acts done in the discharge of duty, or by color of office and also for the salaries and pay required by this act, and such other general and contingent expenses as may from time to time in the judgment of such board of estimate and apportionment, become necessary or proper, with the enumeration thereof. Such estimate shall be accompanied with a written apportionment by said board, of the proportion of expenses applicable to each of the cities and parishes in the Metropolitan district, in ratio of the number of police officers and men authorized by this act, and employed by such cities and parishes respectively. The said estimate and apportionment shall be submitted to the mayors of the cities

and police juries of the parishes within the said Metropolitan district to consider the same, and if the said mayors or police juries shall object in writing to such estimate and apportionment, or to any portion thereof, and so notify, or cause to be notified the said board of commissioners, it shall be the duty of the latter to carefully revise the same and consider the said objection; but if such board shall adhere to their original action of estimate and apportionment or if they shall modify the same, then their action shall be final and shall be binding upon the respective cities and towns interested therein.

SEC. 28. *Be it further enacted, etc.*, That the said board of commissioners shall make a correct estimate and apportionment for each of the cities and parishes within the Metropolitan district, of the number of police officers and stations, of lockups, houses of detention, beds and benning, fixtures, furniture, and all other necessary equipments and accommodations required for the efficient working of the department in such cities and parishes respectively, and it is hereby declared to be the duty of the mayors and common councils of such cities, and of the police juries of such towns, to provide for the foregoing enumerated police offices, stations, lockups, houses of detention, beds, bedding, furniture, fixtures, equipments and accommodations, in accordance with and agreeably to the estimate and apportionment of the board of commissioners; and in case the said mayors, common councils, or police juries of said cities and parishes neglect or refuse, within ten days after having been thereto in writing notified by the said board to provide all the foregoing enumerated police offices, stations, lockups, houses of detention, furniture, fixtures, beds, bedding, equipments and accommodations, as required by the estimate and apportionment of the said board, then the said board of commissioners may make their own provisions by contract, leasing, hiring, purchasing and repairing, and such contracts, leases, and purchases as aforesaid shall be a proper charge and debt

against the said cities and parishes, the mayors, common councils and police juries of which so refused or neglected to make provision in manner and form as aforesaid; but the title to all real property purchased for the purpose aforesaid shall vest in the cities and parishes respectively which contributed the money to purchase the same.

SEC. 29. *Be it further enacted, etc.*, That the common councils of the cities of New Orleans, Jefferson City and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and St. Bernard are hereby respectively empowered and directed annually to order and cause to be raised and collected by the tax upon the estates, real and personal subject to taxation according to law, within the said cities and towns, the sums of money as aforesaid, annually estimated and apportioned as the share of such cities or parishes of the said total expenses of the Metropolitan police district.

SEC. 30. *Be it further enacted, etc.*, That the State treasurer shall receive the sums estimated and apportioned to the said cities and parishes of the Metropolitan district from or through the treasurers of said cities and parishes respectively and give proper receipts for such sums as he may receive. All moneys paid out of the Metropolitan police fund shall be so paid out on a warrant signed by the president and any two other members of the board, attested by the chief clerk.

SEC. 31. *Be it further enacted, etc.*, That it shall be the duty of the board of Metropolitan police, if in their judgment advisable, to set apart a Metropolitan sanitary police company, and appoint a captain and sergeants not exceeding four of said company and to assign to said company such special powers and duties by the orders, rules and regulations as may be publicly advantageous.

SEC. 32. *Be it further enacted, etc.*, That the Metropolitan sanitary company is hereby empowered, under such distribution of power and duty as may be made by the rules and egulations, to visit and make inspection of all ferry-boats,

manufactories, slaughter-houses, tenement-houses, hotels and boarding-houses, and edifices suspected of or charged with being unsafe, and to take all necessary legal measures for promoting the public peace, security of life or health upon or in said boats, manufactories, houses and edifices, and to make report of inspection in the premises to the board of Metropolitan police. Whenever said board shall be satisfied by such report that any ferry-boat, manufactory, slaughter-house, tenement-house or edifice is maintained in a manner prejudicial to the lives or health of the public, it shall cause complaint to be made, founded on such report, before any court of competent jurisdiction of such city or parish where such ferry-boat, manufactory, slaughter-house, tenement-house or edifice is maintained, which shall upon such complaint, made under oath, issue its proper warrant in the name of the people of the State of Louisiana for the arrest of the person in charge of the ferry-boat, manufactory, slaughter-house, tenement-house or edifice to be brought before such court, and the complaint to be duly investigated, according to the laws of examination into such misdemeanors. If said court shall be satisfied, on a summary hearing thereof, that such charge is founded on reasonable and probable cause, he may, by his order in writing, command any such ferry-boat to cease running, and such edifice to be closed, or any business in such manufactory or slaughter-house to cease, until the cause of complaint aforesaid, if found to be well founded, shall be removed to the satisfaction of the board of Metropolitan police. Whereupon it shall be the duty of the police to enforce the order of such court.

SEC. 33. *Be it further enacted, etc.*, That whenever the captain of the sanitary company shall report to the board of police that any premises or any part of any premises in any precinct is in a filthy condition, or in a condition dangerous to health, the board may cause notice to be given to the owner thereof, or his agent in charge of the property, or the

occupant thereof, to cleanse the same within three days. If the premises are not cleansed at the expiration of the said three days, the board of police may order and employ any person to cleanse the same, whereupon the person so ordered shall have power to enter upon and cleanse said premises, and the person so cleansing the premises, in pursuance of the said order, shall maintain an action against the owner of the premises so cleansed, for the services so rendered, and expense incurred in such cleansing, in the same court, in the same manner and with like effect as if the owner of said premises had himself employed the said person to cleanse the said premises.

SEC. 34. *Be it further enacted, etc.*, That the board of police for meritorious and extraordinary services rendered by any member of the police force in the due discharge of his duty, may permit any member of the police force to retain for his own benefit any reward or present tendered him therefor; and it shall be cause of removal from the Metropolitan police for any member thereof to receive any such reward or present without notice thereof to the board of Metropolitan police.

SEC. 35. *Be it further enacted, etc.*, That all fines imposed by the board of police upon members of the Metropolitan police force by way of discipline, and collectible from pay or salary, and all rewards, fees, proceeds of gifts and emoluments that may be paid and given for account of extraordinary services of any member of the Metropolitan police force, except when allowed to be retained by said member, and all moneys remaining for the space of one year in the hands of the property clerk, or arising from the sale of unclaimed goods, and all proceeds of suit for penalties under this amended act shall be deposited and paid into the bank wherein the treasurer of the board of Metropolitan police shall keep an account. The payments so made shall constitute and be deposited, and kept as a fund to be called the "Metropolitan police fund," and the persons who shall

from time to time fill the office of the said treasurer of the board of Metropolitan police and that of treasurer of the city of New Orleans, are hereby declared the trustees of the said fund, and may from time to time invest the same, in whole or in part, as they shall deem most advantageous for the objects of such fund, and are empowered to make all necessary contracts, and take all necessary remedies in the premises.

SEC. 36. *Be it further enacted, etc.*, That if any member of the Metropolitan police force whilst in the actual performance of duty shall become permanently disabled, so as to render his dismissal from membership proper, or if any such member shall become superannuated after ten years of membership, a sum of not exceeding one hundred and fifty dollars as an annuity to be paid such member, shall become chargeable upon the Metropolitan police fund. If any member of the Metropolitan police force, whilst in the actual discharge of his duty shall be killed, or shall die from the immediate effect of any injury received by him whilst in such discharge of duty, or shall die after ten years' service in the force, and shall leave a widow, and if no widow, any child or children under the age of sixteen years, a like sum by way of annuity shall become chargeable upon said fund to be paid to such widow so long only as she remains unmarried, or to such child or children so long as said child, or the youngest of said children continues under the age of sixteen years. In every case the board of Metropolitan police shall determine the circumstances thereof, and order payment of the annuity to be made by draft, signed by each trustee of the said fund. But nothing herein contained shall render any payment of said annuity obligatory upon said board of trustees, or chargeable as a matter of legal right. The board of Metropolitan police, in its discretion may, at any time, order such annuity to cease.

SEC. 37. *Be it further enacted, etc.*, That whenever property or money shall be taken from persons arrested and shall be

alleged to have been feloniously obtained, or to be the proceeds of crime, and whenever so brought, with such claimant and the person arrested before some court of competent jurisdiction for adjudication, and the court shall be then and there satisfied from evidence that the person arrested is innocent of the offence alleged, and that the property rightfully belongs to him, then said court shall thereupon, in writing, order such property or money to be returned; and the property clerk, if he have it, to deliver such property or money to the accused person himself, and not to any attorney, agent or clerk of such accused person.

SEC. 38. *Be it further enacted, etc.*, That if any claim to the ownership of such property or money shall be made on oath before such court, by or in behalf of any other persons than the persons arrested, and the said accused person shall be held for trial or examination, such property or money shall remain in the custody of the property clerk until the discharge or conviction of the persons accused.

SEC. 39. *Be it further enacted, etc.*, That all property and money that shall remain in the custody of the property clerk for the period of six months without any lawful claimant thereto, after having been three times advertised in public newspapers, shall be sold at public auction and the proceeds of such sale shall be paid into the Metropolitan police fund.

SEC. 40. *Be it further enacted, etc.*, That if any money or property placed in the custody of the property clerk shall be desired as evidence in any police or other criminal court, such property shall be delivered to any officer who shall present an order to that effect from such court. Such property, however, shall not be retained in said court, but shall be returned to said property clerk to be disposed of according to the previous provisions of this act.

SEC. 41. *Be it further enacted, etc.*, That it is hereby made the duty of the Metropolitan police force, at all times of day and night, within the Metropolitan district, and the officers

and members of such force are hereby thereunto empowered to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful and dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places, protect the right of person and property, guard the public health, preserve order at elections and at all public meetings, assemblages, theatres and all places of public amusement and resort, prevent and regulate the movement of teams and vehicles in the streets and roads, remove all nuisances in the public streets, parks and highways, arrest all street mendicants and beggars, and all dangerous and suspicious characters, loafers and pimps, provide proper police attendance at fires, assist, advise and protect emigrants, strangers and travelers in public streets, at steamboat and ship landings and railroad depots, carefully observe and inspect all places of public resort and amusement, all houses of ill fame or prostitution, and houses where prostitutes resort or reside, all lottery or policy stands and shops, all gambling-houses, cock-pits, dog-pits, rat-pits, all common dance-houses and ball-rooms, and to repress and restrain all unlawful or disorderly conduct or practices therein, enforce and prevent the violation of all laws and ordinances in force in said district; and for these purposes, with or without warrant, to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes and offenses.

SEC. 42. *Be it further enacted, etc.*, That the several officers and members of the Metropolitan police force shall have power and authority to immediately arrest and take into custody, without warrant, any person who shall commit, or threaten to commit, or attempt to commit, in the presence of said officer or member, or within his view, any breach of the peace or offence directly prohibited by act of the legislature, or by any ordinance of the cities within which the offense is committed, threatened, or attempted, but such

officer or member of the police force shall, under the penalty of ten days' fine or dismissal from the force, in the discretion of the board, convey in person such offender before a court of the city or parish where the arrest is made, that he may be dealt with according to law. If the arrest is made during the hours that the court does not hold its regular session, or if the court is not in session, such offender shall be detained in a station-house or lockup until the next public sitting of the magistrate, and no longer, but he shall then be conveyed without delay before the court to be dealt with according to law.

SEC. 43. *Be it further enacted, etc.*, That the board of police shall possess powers of general police supervision and inspection, and may delegate the same to any member of the force over all licensed or unlicensed pawnbrokers, vendors, junk-shop keepers, junk-boatmen, cart, cab or hack men, dealers in second-hand merchandise, cotton pickeries, intelligence-office keepers and auctioneers within the said Metropolitan district; and in the exercise of and in the furtherance of said supervision, may from time to time empower members of the police force to fulfill such special duties in the aforesaid premises as they may from time to time ordain.

The said board of commissioners may by authority in writing, empower any member of the police force, whenever such member shall be in search of property feloniously obtained, or in search of suspected offenders, or evidence to convict any person charged with crime, to examine the books of any pawnbroker or his business premises, or the business premises of any licensed vendor, junk-shop keeper, or dealer in second-hand merchandise, or intelligence office, cotton pickery, junk-boat, or auctioneer. Any such member of the said police force, when thereunto authorized in writing by the said board of commissioners, shall be authorized to examine property alleged to be pawned, pledged, deposited, lost or stolen, in whosoever possession said property

may be, but no such property shall be taken from the possessor thereof without due process or authority of law.

Any willful interference with any members of the board of commissioners, the superintendent, or with any member of the police force by any of the persons hereinbefore named in this section, while in official discharge of duty, shall be punished as a misdemeanor.

SEC. 44. *Be it further enacted, etc.*, That if any member of the Metropolitan police force, or if any two or more householders shall report in writing, under his or her signature, to the board of commissioners or any member thereof, that there are good grounds (and stating the same) for believing any houses, rooms, or premises within the said Metropolitan district to be kept or used as a common gaming-house, common gaming-room, or common gaming premises, for therein playing for wages of money at any game of chance, to be kept or used for lewd and obscene purposes and amusements, it shall be lawful for the board of commissioners to authorize in writing, any member or members of the police force, to enter the same, who may forthwith arrest all persons there found offending against the law, but none others, and seize all implements of gaming and convey any person so arrested before a court of competent jurisdiction, and bring the articles so seized to the office of the board of commissioners. It shall be the duty of the board of commissioners to cause such arrested persons to be vigorously prosecuted; and such articles seized to be destroyed as the orders, rules and regulations of the board of commissioners shall direct.

SEC. 45. *Be it further enacted, etc.*, That in the performance of police service in any precinct or precincts composed of waters, and in lieu of station-houses, the board of commissioners may procure and use and employ such rowboats and steamboats as shall be deemed necessary and proper.

In suburban or sparsely inhabited precincts they may establish a mounted patrol, and procure, and use and employ so many horses and equipments as shall be requisite for the

purpose; and they may procure and cause to be used any teams and vehicles required to transport prisoners, supplies and property whenever it shall be proper and economical to do so; and may sell and dispose of any personal property owned or used in the department, whenever it shall have become old and unfit, or not required for service; such sales to be made at public auction, and the proceeds thereof to be paid into the Metropolitan police fund.

SEC. 46. *Be it further enacted, etc.*, That the officers and members of the Metropolitan police force of the said Metropolitan district shall furthermore possess in every part of this State all power now conferred by law upon constables, except for the service of civil process, and any warrant for search or arrest issued by any magistrate of this State may be executed in any part thereof by any member of the police force of the said Metropolitan district.

SEC. 47. *Be it further enacted, etc.*, That the board of commissioners shall have authority to offer rewards to induce all classes of persons to give information which shall lead to the detection, arrest and conviction of persons guilty of homicides, arsons, or receiving stolen goods, knowing them to be stolen, and to pay such rewards to such persons as shall give such information. Such rewards shall be paid from the Metropolitan police fund from warrants on the treasurer of the State, drawn in the manner hereinbefore provided for other purposes.

SEC. 48. *Be it further enacted, etc.*, That in every case of arrest by any member of the Metropolitan police force, the same shall be made known immediately to his superior upon duty in the precinct wherein the arrest was made by the person making the same; and it shall be the duty of the said superior, within twenty-four hours after such notice, to make written returns thereof, according to the rules and regulations of the board of commissioners, with the name of the party arrested, the alleged offense, the time and place of arrest, and the place of detention.

SEC. 49. *Be it further enacted, etc.*, That every officer and member of the Metropolitan police force shall have issued to him by the board of commissioners, a proper warrant of appointment, signed by the president and secretary of the said board, which warrant shall contain the date of his appointment and his rank.

SEC. 50. *Be it further enacted, etc.*, That the salaries and compensation of police commissioners and other officers and employés of the board of Metropolitan police shall, from the time of their appointment, be as follows:

President of the board, two thousand five hundred dollars ($2,500).

Treasurer of the board, two thousand five hundred dollars ($2,500).

Other commissioners, each two thousand dollars ($2,000).

Superintendent, three thousand dollars ($3,000).

Chief clerk, two thousand dollars ($2,000).

Deputy clerk, one thousand six hundred dollars ($1,600).

Property clerk, one thousand two hundred dollars ($1,200).

Other clerks, one thousand two hundred dollars ($1,200).

Police surgeons, one thousand six hundred dollars ($1,600).

Captains, one thousand eight hundred dollars ($1,800).

Sergeants, one thousand five hundred dollars ($1,500).

Corporals, one thousand one hundred dollars ($1,100).

Detectives, one thousand four hundred dollars ($1,400).

Patrolmen, one thousand dollars ($1,000).

Doormen, eight hundred dollars ($800).

The salaries and pay aforesaid shall be paid monthly to each person entitled thereto, in modes to be prescribed by the rules and regulations, subject to such deductions each month from the salaries or pay of each member of the Metropolitan police force as the treasurer shall make (and which deduction he is hereby authorized to retain) to satisfy fines imposed on any member of the Metropolitan police force by way of discipline or punishment, as prescribed by the rules and regulations of the board. The salaries of the

commissioners shall be paid by the treasurer of State out of the Metropolitan police fund.

SEC. 51. *Be it further enacted, etc.*, That the board of commissioners shall, at all times, cause the ordinances of the cities of New Orleans, Jefferson City and Carrollton, and of the towns of Algiers and Gretna, and the ordinances of the parishes of Orleans, Jefferson and St. Bernard, not in conflict with the provisions of this act, to be properly enforced; and it shall be the duty of the said board at all times whenever consistent with the rules and regulations of the board, and with the requirements of this act, to furnish all information desired by the mayors, common council and other authorities of said cities and towns.

SEC. 52. *Be it further enacted, etc.*, That the said board of commissioners are hereby furthermore authorized and empowered to erect, operate and maintain, under the general laws of the State relating to telegraph lines, all such lines of telegraph in such places within the said Metropolitan police district as for the purposes of police and fire the board shall deem necessary; and to employ all such telegraph operators, batterymen and linemen as may be required for, and may be necessary to the proper and efficient working of the said police and fire-alarm telegraph. But the ownership of the fixtures, instruments and apparatus for such telegraph purposes in the cities of New Orleans, Jefferson City, Carrollton and the towns of Algiers and Gretna, and the parishes of Orleans, Jefferson, and St. Bernard shall vest in the respective municipal corporations of the said cities and towns, but subject to the exclusive use and control, except for fires and fire purposes, of the said board of Metropolitan police commissioners.

SEC. 53. *Be it further enacted, etc.*, That the said board of commissioners shall appoint a superintendent and assistant superintendent of the police telegraph, the superintendent of fire-alarms and police telegraph shall appoint three telegraph operators, one lineman, one batteryman, subject in

all cases to the approval of the board of commissioners. The telegraph operators shall also act as clerks of police stations. The said board shall promulgate all orders, rules and regulations to the said telegraph corps through the superintendent, who shall be the executive head of the whole corps, and who shall have control and direction of the same subject to the rules, regulations and orders of the board of commissioners.

SEC. 54. *Be it further enacted, etc.*, That the salaries and compensations of the said police telegraph corps shall be as follows:

To a superintendent of fire-alarm and police telegraph two thousand five hundred dollars ($2,500) per annum.

To the assistant superintendent of fire-alarm and police telegraph one thousand eight hundred dollars ($1,800) per annum.

To the operators one thousand four hundred dollars ($1,400) per annum.

Linemen one thousand eight hundred dollars ($1,800) per annum.

Batterymen eight hundred dollars ($800).

The salaries and pay aforesaid shall be paid monthly to each person entitled thereto in modes to be prescribed by the rules and regulations of the board subject to such deduction for neglect of duty, violation of rules and regulations, etc., as may be adjudged and prescribed by the board.

SEC. 55. *Be it further enacted, etc.*, That there shall be appointed by the board of police commissioners two surgeons, who shall perform the duty now performed by the city physicians and such other duties as the commissioners may from time to time prescribe. The police surgeons shall also act as experts for the coroners, making post-mortem examinations whenever called upon by the coroners of the districts. The salary of these surgeons shall be two thousand five hundred dollars ($2,500) per annum.

SEC. 56. *Be it further enacted, etc.*, That all persons who

may be arrested under the provisions of this act shall be admitted to bail in the manner and by the court or officers now prescribed by law.

SEC. 57. *Be it further enacted, etc.*, That all laws or parts of laws conflicting with the provisions of this act, be and the same are hereby repealed, and that this act shall take effect from and after its passage.

(Signed) CHAS. W. LOWELL,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved September 14, 1868.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy.

GEO. E. BOVEE,
Secretary of State.

BENJAMIN *v.* NEW ORLEANS.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 188. Argued January 10, 1898. — Decided January 31, 1898.

After the answers of this court to the questions of the Circuit Court of Appeals in this case, reported in *New Orleans* v. *Benjamin*, 153 U. S. 411, Benjamin amended his bill in the Circuit Court by inserting an averment that "each of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th day of February, 1891, citizens respectively of States other than the State of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made." The city demurred on the ground that the case was not one of equitable cognizance, and that the amendment was insufficient to show jurisdiction. This demurrer was sustained in the Circuit Court, and the Circuit Court of Appeals affirmed its decree because the necessary diversity of citizenship was not affirmatively shown. *Held*, that this judgment of the Circuit Court of Appeals was final, and could not be appealed from.

THE case is stated in the opinion.

Mr. J. D. Rouse for appellant. *Mr. William Grant* was on his brief.

Mr. Branch K. Miller for appellees.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was a bill filed by Henry W. Benjamin, "an alien and a subject of the Kingdom of Great Britain," on February 9, 1891, in the Circuit Court of the United States for the Eastern District of Louisiana, "against the city of New Orleans, a municipal corporation, created by the laws of the State of Louisiana and a citizen of said State; the city of Kenner, also a municipal corporation created by the laws of and a citizen of said State; the Police Jury of the Parish of Jefferson and

the Police Jury of the Parish of St. Bernard, political corporations created by the laws of and citizens of said State," seeking to collect, in the manner and on the grounds therein set forth, certain Metropolitan Police warrants or certificates. The defendants other than the city of New Orleans seem to have dropped out in the course of the proceedings.

The jurisdiction of the Circuit Court was attacked by defendant but was maintained, and a decree entered in favor of complainant, from which defendant appealed to the Circuit Court of Appeals for the Fifth Circuit, whereupon that court certified certain questions to this court, by the answers to which it was determined that no such dispute or controversy arose in the case as gave jurisdiction to the Circuit Court without regard to the diverse citizenship of the parties, and that as the suit was, under the pleadings, a suit to recover the contents of choses in action within the meaning of the judiciary acts of 1887 and 1888, by the assignee thereof, and it did not appear that it could have been brought in that court by the assignors, the jurisdiction of the Circuit Court could not be maintained on the ground of diverse citizenship. *New Orleans* v. *Benjamin*, 153 U. S. 411.

On receipt of the answers certified from this court, the Circuit Court of Appeals reversed the decree of the Circuit Court and ordered that court to dismiss the bill, unless by amendment its jurisdiction could be made affirmatively to appear. Thereupon complainant amended the bill by inserting the following: "And your orator avers that each of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th day of February, 1891, citizens respectively of States other than the State of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made."

The city of New Orleans demurred for the reasons that the case was not one of equitable cognizance, and that the amendment was insufficient to show jurisdiction. The Circuit Court sustained the demurrer on both grounds and dismissed the

bill, (71 Fed. Rep. 758,) whereupon the cause was taken to the Circuit Court of Appeals, which affirmed the decree because the necessary diversity of citizenship was not affirmatively shown. 41 U. S. App. 178.

The case was not brought here directly from the Circuit Court of the United States on the question of the jurisdiction of that court as such, nor did the Circuit Court of Appeals, when the case came before it for the second time, certify any question on which it desired our instruction.

On the contrary, this is an appeal from a judgment of the Circuit Court of Appeals affirming the decree of the Circuit Court, and the inquiry at once presents itself as to our jurisdiction to entertain such appeal.

By the sixth section of the judiciary act of March 3, 1891, the judgments or decrees of the Circuit Courts of Appeals are made final in certain classes of cases, and, among others, "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States." This case confessedly did not belong to either of the other classes, and if it fell within the class just mentioned, this appeal will not lie.

The judicial power extends to controversies between citizens of different States; and between citizens of a State and citizens or subjects of foreign States; but from the judiciary act of 1789 to the act of August 13, 1888, it has been provided in substance, (the differences being immaterial here,) that no Circuit Court shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." And, to avoid the operation of this limitation, it is necessary in such cases that the record should show that the suit could have been maintained in the Circuit Court in the name of the assignor. *Parker* v. *Ormsby*, 141 U. S. 81.

As this suit stood, after it had been determined that the jurisdiction of the Circuit Court could not be invoked on the ground that the cause of action arose under the Constitution or laws of the United States, the jurisdiction rested on the fact that the complainant was an alien and the defendant a citizen of Louisiana, although, by reason of the restriction, it was also essential that it should appear that complainant's assignors might have brought suit in the Circuit Court if they had not assigned their claims.

But the jurisdiction was none the less dependent on diverse citizenship as between complainant and defendant because it might be defeated if complainant did not bring himself within the restriction. The diverse citizenship of the assignors of the claims was not another ground of jurisdiction than the diverse citizenship of complainant and defendant, and the sixth section, in referring to cases in which the jurisdiction is dependent entirely on diverse citizenship between the opposite parties to the suit or controversy, refers to cases where no other distinct ground of jurisdiction is relied on. It frequently happens that more than one ground is set up as between the same parties, and also separate and different grounds in respect of one or more of several parties. We think the case, within the intent and meaning of that section, clearly belongs to the class in which the judgments and decrees of the Circuit Court of Appeals are made final.

Appeal dismissed.

Mr. Justice White took no part in the consideration and decision of this case.